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No. _____

In The

Supreme Court of the United States

CONSTRUCTORA LLUCH, INC. and
CNA CASUALTY OF PUERTO RICO, INC.,

Petitioners,

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CONSTITUTIONAL QUESTION

In a second jury trial on the issue of damages the jury rendered a verdict of no damages in favor of Petitioners. On appeal, the First Circuit reversed and remanded the case for a third jury trial on the issue of damages on the sole ground that the weight of the evidence presented to the jury required an award of damages. With this holding the First Circuit made a factual determination of an amount of damages not found to exist by the jury, in violation of the Seventh Amendment to the Constitution.

JURISDICTIONAL QUESTION

Respondent, filed a motion for new trial requesting the reversal of the jury verdict. The district court denied said motion with an opinion and order that was duly entered, docketed, and notified. Respondent filed a notice of appeal after the expiration of the thirty-days term from the entry of the said opinion and order. Upon the objection of Petitioners to the appellate jurisdiction on the ground that the filing was untimely, the First Circuit assumed jurisdiction on appeal deciding – contrary to decisions of other Circuits – that, since no "separate document" under Fed. R. Civ. P. 58 was issued subsequent to said order denying Respondent's post-judgment motion, the tolling of the time to appeal the judgment had not been interrupted and the appeal was timely.

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that the Court issue a writ of certiorari to review: (i) that part of the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 18th, 1999, that vacated the judgment of the district court based on the jury verdict awarding no damages to Respondent and remanding the case to the district court for a second new trial on the issue of damages; and, (ii) the exercise of appellate jurisdiction by the First Circuit.

OFFICIAL REPORT OF OPINION

The opinion object of this petition is published in *Puerto Rico Aqueduct & Sewer Authority v. Constructora Lluch, Inc.*, 169 F.3d 68 (1st Cir. 1999). Prior opinion and judgment were entered on January 19, 1999 (See *Puerto Rico Aqueduct & Sewer Authority v. Constructora Lluch, Inc.*, 1999 WL 12793 (1st Cir. Jan 19, 1999) which were vacated and withdrawn by the First Circuit on February 16, 1999.)

JURISDICTION

The judgment and opinion sought to be reviewed were entered by the First Circuit on February 18, 1999; on April 13, 1999, the First Circuit entered an order denying a petition for rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(i).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Seventh Amendment to the Constitution, U.S. Const. Amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Supreme Court Rule 13(3) provides in its relevant part that:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

Fed. R. App. P. 4(a)(4) provides:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting

other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Fed. R. App. P. 4(a)(7) provides:

(7) Entry Defined. A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 58 provides:

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

STATEMENT OF THE CASE

The federal jurisdiction in the United States District Court for the District of Puerto Rico was based on 28 U.S.C. § 1332 (diversity of citizenship).

Puerto Rico Aqueduct and Sewer Authority ("PRASA") Respondent, as owner, engaged Constructora Lluch, Inc., ("Lluch") as general contractor, to construct a compost treatment building and facilities in Mayaguez, Puerto Rico. CNA Casualty of Puerto Rico, Inc. ("CNA") is the insurance company that issued a general public liability insurance policy on behalf of Lluch with a limited coverage of $500,000.00.

On October 22, 1989, during the construction of the project, part of the steel roof structure of the main compost treatment building collapsed. Lluch continued the

execution of the works in the project with the authorization and under the supervision of Respondent. After Lluch had substantially completed the construction of the project – with the exception of the installation of the steel roof structure that had collapsed – Respondent demolished the entire project, over Lluch's objection and without justification.

On August 9, 1993, after a twenty-four days trial, the jury, in a special verdict form, found that: (1) Lluch improperly removed the surcharge from the construction site or in some other way breached its contract with Respondent by negligent construction work; (2) this breach caused the collapse of the roof structure; (3) this breach caused damages to Respondent; (4) Respondent's demolition of the remains of the structure was unjustified; and (5) Respondent suffered $4,587,202.77 in damages as a result of Lluch's breach. With regard to Lluch's counterclaims against Respondent, the jury found that: (1) Respondent breached its contract with Lluch; (2) this breach caused damages to Lluch in the amount of $138,758.00; (3) Respondent owed Lluch $617,713.59 for work performed on the contract; and (4) Respondent owed the Architect of the project, Lebrón & Associates, $40,148.28. As a result of these findings, the jury awarded: (1) $4,587,202.77 to Respondent for Lluch's negligence and breach of contract; (2) $756,471.59 to Lluch on its counterclaims against Respondent for breach of contract and money owed on the contract.

On July 27, 1994, the district court granted Petitioners' motions for new trial subject to Respondent's acceptance of a "remittitur". The court concluded that the jury award was inappropriate in light of the evidence

presented and gave Respondent the option of accepting a remitted award of $1,224,000.00 or a partial new trial on damages. Respondent opted for a new trial on the issue of damages.

On February 7, 1996, the district court limited the scope of the first new trial on the issue of damages to the extent of Respondent's damages at the time of the collapse.

On July 15, 1997, after the second jury trial, the jury returned the verdict form indicating that it found that Respondent had suffered no damages. Judgment was entered pursuant to the jury verdict and ordering that Respondent was to receive no compensation from Petitioners.

On August 1, 1997, Respondent filed a motion for a second partial new trial on the issue of damages or for reinstatement of the August 9, 1993 original verdict of the first jury trial. On December 11, 1997, the court notified and entered an opinion and order denying Respondent's motion. On December 22, 1997, Respondent filed a motion to alter or amend the December 11, 1997 opinion and order. On January 22, 1998, the district court denied Respondent's motion to alter or amend by an order in the margin of the motion. On January 27, 1998, Respondent filed a notice of appeal from the July 16, 1997 judgment, the December 11, 1997 opinion and order, and the January 22, 1998 margin order.

Petitioners opposed the appellate jurisdiction on the ground that it was filed after the jurisdictional term of thirty days from the entry of the district court's opinion and order of December 11, 1997 denying the motion for

new trial. The First Circuit assumed jurisdiction and, on February 18, 1999, entered a judgment and opinion reversing the judgment based on the jury verdict of no damages and remanding the case for a third jury trial on the issue of damages.

REASONS FOR GRANTING THE WRIT

1. *Constitutional Issue.* On February 18, 1999, the First Circuit entered the judgment and opinion sought to be reviewed herein vacating the judgment based on the jury verdict awarding no damages to Respondent and remanding the case for a new trial on the issue of damages on the only ground that the jury verdict of "no damages" was against the weight of the evidence. This decision conflicts with the decision of the Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935), forbidding the use of an *additur* under the Seventh Amendment of the Constitution.

The Seventh Amendment to the Constitution in its pertinent part provides that: . . . *no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.* This Court in *Dimick, supra,* decided that the Seventh Amendment forbids the use of an *additur,* i.e., that the allowance of a motion for new trial be conditional upon the refusal of the defendant to *an increase* in the amount of damages as follows:

> *The controlling distinction between the power of the court and that of the jury is that the former is the*

power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determined the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess – in that sense that it has been found by the jury – and that the remittitur has the effect of merely lopping off an excrescence. But, where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept 'an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess'. Dimick, supra, at 486.

The decision in *Dimick, supra,* was that an increase by the court to the amount decided by the jury was a *'bald*

addition of something which in no sense can be said to be included in the verdict'. Consonant with the allocation of the fact finding power in the jury, a court cannot find as a fact the existence of an amount of damages that was not found to exist by the jury. When the court reduces the amount of a jury verdict through a *remittitur* it "is adopting" facts that have been included in the jury verdict; in such a case the factual determination of the "amount of damages" is *within* the jury verdict. However, if the amount of damages propounded by the court is greater than the verdict amount, such increase was not a fact determined by the jury – it would be a fact *added* by the court *beyond* the facts determined by the jury and thus contrary to the Seventh Amendment limitation.

When the jury verdict is for a certain amount of damages there exists a constitutional possibility for the trial court to intervene within the maximum amount or confines of the jury's finding of damages – to ascertain the weight of the evidence in reviewing a denial of a motion for new trial. To the contrary, when the verdict does not include any amount, as in our case, there is no constitutional power in the trial court, and much less in the appellate court, to evaluate the evidence presented to the jury and its credibility to determine, as a fact, the existence of an amount. The Seventh Amendment prohibition to retry facts evaluated by the jury extends, not only to limit a court's ability *to increase an award* of damages granted by the jury, but *to find proven any fact* not found to exist by the jury.

To intervene with the jury's verdict the First Circuit argued that since Eng. Edison Lluch (President of Lluch)

testified that – although it would not be borne by Respondent – the cost to be incurred by Lluch to repair the collapsed structure would be $470,000.00, the jury verdict of no damages was against the weight of the evidence presented and thus should be reversed and a new trial held.

Under the prohibition of *Dimick, supra,* against an *additur,* the First Circuit could not have conditioned the granting of the third new trial upon Petitioners' acceptance of an "added verdict" of $470,000.00 corresponding to the cost that Lluch would have had to incur to repair the collapsed structure. The First Circuit's judgment and opinion has the effect of circumventing the constitutional prohibition of ordering an *additur* by, instead, directly ordering a new trial. We respectfully submit that the Seventh Amendment and *Dimick, supra,* impede the remand for a new trial based on a finding of fact of damages made by the First Circuit greater than the finding of fact of the amount of damages made by the jury – zero. Following the reasoning in *Dimick, supra,* it cannot be held that the jury included as a matter of fact any amount in the verdict, *it was zero.*

The jury award of zero damages is in the extreme of the pendulum of possible jury awards and closes the door for judicial interpretation or intervention with the jury's award of credibility to the witnesses or the weight of the evidence presented by the parties. In ordering a new trial the First Circuit in effect decided that the jury was bound to give credibility to the evidence of damages presented by the parties, precisely what the Seventh Amendment bars: the court re-examination of the fact decided by the jury that Respondent suffered no damages.

In the December 11, 1997, Opinion and Order, the district court concluded that the jury verdict of no damages demonstrated that Respondent had failed to prove the damages as well as that the witnesses presented were not credible, and concluded that the fact that the jury may have chosen not to believe Respondent's witnesses could not justify a new trial. The First Circuit reversed the district court's denial of the motion for new trial and, in doing so, entered to decide, as a matter of fact, that the evidence presented required an award of damages. In so deciding the First Circuit went beyond the scope of review of the district court's denial of a motion for new trial, i.e., whether there was an "abuse of discretion" in deciding the motion. (*Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996); *Vda. de Pérez v. Hospital del Maestro*, 910 F. 2d 1004 (1st Cir. 1990); *Ruiz v. González Caraballo*, 929 F.2d 31 (1st Cir. 1991); *Correa v. Hospital San Francisco*, 69 F.3d 1184 (1st Cir. 1995), *cert. denied*, 517 U.S. 1136 (1996); *Blinzler v. Marriott International, Inc.*, 81 F.3d 1148 (1st Cir. 1996).

The First Circuit decision to remand the case for a new trial was not based in any question of law, the finding of fact made by the jury of no damages precludes any further evaluation of the evidence presented at the trial. The weight that the First Circuit gave to the evidence presented to the jury to support the reversal and remand does not involve any matter of law but rather is precisely a matter of fact that the Seventh Amendment reserves for the jury (*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)). The sole function of the jury is, by weighing the evidence presented, to find whether the facts were proven or not. In our case the jury,

as the judges of the damages, found that none were proved. The nature of appellate review of the trial court's denial of a motion for new trial to determine if the verdict was *insufficient* – in our case to be zero – is factual and therefore inconsistent with the Seventh Amendment.

In *Mayo v. Schooner Capital Corp.*, 825 F.2d 566 (1st Cir. 1987), the First Circuit recognized the delicate power of reviewing the district court's denial of a new trial on the ground that the verdict is against the clear weight of the evidence as follows: *Our review of this decision is necessarily circumscribed first, by our operation of the district court's superior ability to monitor the conduct of the trial and assess the credibility of witnesses, and second, by the jury's constitutionally sanctioned role as finder of fact.* Further the case of *Doop v. Pritzker*, 38 F.3d 1239 (1st Cir. 1994) stated that: *a reviewing court will not tinker with the jury's assessment of money damages as long as it does not fall outside the broad universe of theoretically possible awards that can be said to be supported by the evidence.* The jury's judgment on the appropriate amount of damages to be awarded is rarely overridden – *Mejias-Quiros v. Maxxam Property Corp.*, 108 F.3d 425 (1st Cir. 1997); *Brown v. Freedman Baking Co.*, 810 F.2d 6 (1st Cir. 1987). It constitutes an error for the appellate court not to defer to the discretion of the trial court regarding motions for new trial. *This is especially true where the motion for new trial is made because the jury's verdict allegedly is against the weight of the evidence . . . That is the sort of decision most appropriately left to the broad discretion of the trial court, because it is directly predicated on the facts and the evidence adduced at trial, and because a jury's verdict on the facts should only be overturned in the most compelling circumstances. Wells Real Estate, Inc. v. Greater*

Lowell, 850 F.2d 803, 810-11 (1st Cir. 1988), *cert. denied*, 488 U.S. 955 (1988).

The evidence presented at trial in our case on the issue of damages was extensive and contradictory. (See discussion in Petition for Rehearing, app. pp. 51-66) for allowing the jury's award of zero damages to fall comfortably *"within the universe of possible awards that are supported by the evidence." Clark v. Taylor*, 710 F.2d 4, 14 (1st Cir. 1983); *Ruiz v. González Caraballo, supra*, at 35. *"There were, then, myriad possibilities from which the [reasonable] jurors could choose . . . No more was exigible to ground a take-nothing verdict." Quiñones Pacheco v. American Airlines, Inc.*, 979 F.2d 1 (1st Cir. 1992). The First Circuit was previously faced with "no damages" jury awards in the cases of *Poulin Corporation v. Chrysler Corporation*, 861 F.2d 5 (1st Cir. 1988) and *Ruiz Rodríguez v. Colberg Comas*, 882 F.2d 15 (1st Cir. 1989) and in both cases concluded that the jury's award of zero damages had a rational basis on the record and, therefore, should stand undisturbed and considered to be a determination by the jury that the plaintiffs failed to establish an essential part of their proof.

2. *Jurisdictional Issue*. The First Circuit, erroneously, exercised appellate jurisdiction over the present case based solely in *Fiore v. Washington County*, 960 F.2d 229 (1st Cir. 1992), which unconditionally imposes the "separate document requirement" of Fed. R. Civ. P. 58 to denials of postjudgment motions. This view is contrary to the majority of the Circuits that have ruled on this issue and "[a] conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as

the timeliness of post-trial motions, may turn on the questions of when judgment is entered". *U.S. v. Indrelunas*, 411 U.S. 216, 217-218 (1973).

Besides being contrary to other Circuits, *Fiore's*, *supra*, holding has been inconsistently applied by the First Circuit itself in our case, and in the case of *Acevedo-Villalobos v. Hernández*, 22 F.3d 384 (1st Cir. 1994), *cert. denied*, by 513 U.S. 1015 (1994). In the present case, the jurisdiction on appeal by the First Circuit was exercised upon the finding that the district court did not comply with the "separate document requirement" of Fed. R. Civ. P. 58 when it entered the December 11, 1997 Opinion and Order that disposed of Respondent's first motion for new trial. Therefore, the First Circuit concluded that the entry in the docket of the Opinion and Order, by itself, did not stop the tolling of the time to appeal the July 16, 1997 judgment. Relying on *Fiore*, *supra*, the First Circuit held:

> We cannot accept appellees' contentions. We are faced with a different situation than that presented in *Acevedo-Villalobos*. In that case, the Court found that the tolling terminated with the denial of the first postjudgment motion. *See Acevedo-Villalobos*, 22 F.3d at 390. In the present case, however, the December 11, 1997 Opinion and Order – the order denying PRASA's first postjudgment motion – did not stop the tolling of the time to appeal the July 16, 1997 judgment because, as discussed below, it was not a "final judgment" in compliance with the "separate document" rule of Federal Rule of Civil Procedure 58. *Appeals Judgment*, at p. 11.

In *Acevedo*, *supra*, the district court dismissed plaintiffs' action by granting a summary judgment motion. On

the same day the court granted said motion, it entered judgment in a separate document. Plaintiffs then filed two postjudgment motions under Fed. R. Civ. P. 59, both of which were denied by the district court. Even though the denial of said motions was dully docketed in compliance with Fed. R. Civ. P. 79, no "separate document" was issued or entered by the district court together with said denial. (See *Acevedo's, supra,* docket entry #39, app. p. 76).

The First Circuit did not require the application of the "separate document" rule in *Acevedo, supra,* even though the question at issue there was, contrary to our case, directly related to and dependent upon the provisions of Fed. R. Civ. P. 58 – whether the dismissal of the complaint constituted a "final decision" and was therefore appealable. The docket entries of *Acevedo, supra,* in the district court clearly show that, *as in our case,* the district court disposed of the first postjudgment motion with an opinion and order that was dully docketed (See docket entry #624, app. p. 85) with *no second "separate document" being subsequently entered.* With these similar procedural facts, the First Circuit found in *Acevedo, supra,* that it lacked appellate jurisdiction because the tolling of the time to appeal *'terminated with the denial of the first postjudgment motion'*. In our case, however, the First Circuit inconsistently required a "separate document" regarding the Opinion and Order to terminate the tolling of the time to appeal the July 16, 1998 judgment. The First Circuit's exercise of appellate jurisdiction over the present case discards the finality that the July 16, 1997 judgment has under Fed. R. App. P. 4(a)(4).

The First Circuit stands alone[1] in applying unconditionally the "separate document" rule to *denials* of postjudgment motions. A distinction is made by the majority of other circuits that have ruled on this issue as to the applicability of the separate document requirement when a time tolling postjudgment motion is denied or when it is granted. These Circuits have held that if in the disposition of the postjudgment motion the underlying judgment is *significantly altered*, the order should comply with the "separate document" rule due to the fact that the alteration to the underlying judgment could create genuine uncertainty over which district court decision, the judgment or the subsequent order, is the final disposition of the case. Fed. R. Civ. P. 58 was precisely intended to prevent this uncertainty.

The ruling of the Court in *F.T.C. v. Minneapolis Honeywell*, 344 U.S. 206 (1952) should guide the applicability of the "separate document" rule to denials of postjudgment motions. In *F.T.C., supra*, three counts were initially decided against respondents Minneapolis-Honeywell, Co. After abandoning an initial petition to the Seventh Circuit to review all counts, respondents only sought review of Count III. The Seventh Circuit reversed Count III on July

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[1] The only circuit that we have found to adopt *Fiore's, supra*, holding, and apply the separate document rule to denial of postjudgment motions is the District of Columbia Circuit in *United States v. Haynes*, 158 F.3d 1327 (D.C.Cir. 1998). This opinion, however, limits the applicability of the separate document rule to denials of motions under Fed. R. Civ. P. 60(b) and expressly left undecided whether the "disposition of Rule 4(a)(4) tolling motions should be exempt from Rule 58". See *Haynes, supra*, at 1330.

5, 1951. On August 21, 1951, after the time allowed for a petition for rehearing had expired, the Commission requested the Seventh Circuit to, consonant with its reversal of Count III, dispose of the Commission's request to affirm the unquestioned Counts I and II of the Commission's initial order. On September 18, 1951 the Seventh Circuit entered what it labeled a "Final Decree" affirming counts I and II as they were initially adjudicated by the Commission; and Count III as decided by the July 5, 1951 judgment. The Commission on December 14, 1951 filed its petition for Certiorari from the Seventh Circuit's reversal of Count III. The Court analyzing whether the issuance by the Seventh Circuit of the September 18, 1951 "Final Decree", which merely reiterated the contents of the July 5, 1951 judgment, enlarged the Commission's time to seek review of the July 5, 1951 judgment decided:

> *Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised the legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. F.T.C., supra,* at 211-212. (footnotes omitted)

In *F.T.C., supra,* the entry of a *"second judgment"* (September 18, 1951) by the Seventh Circuit did not allow the

Commission to seek review of the then final, underlying judgment (July 5, 1951) because "[t]he judgment of September 18, . . . does not meet this test. It reiterated, without change, everything which had been decided on July 5". *F.T.C., supra,* at 212. The same treatment should be given to an order of a district court which is neither conceived nor entered as a second judgment, but rather as a denial of a postjudgment motion that leaves unaltered the underlying judgment. No "separate document" need to be entered when a district count's order leaves a prior judgment intact. Rather, the entry of said order activates the plain language Fed. R. App. R. 4(a)(4) and stops the tolling of the time to file appeal procedures. Rule 13(3) of the Rules of the Supreme Court embodies this principle where, to stop the tolling of the time to file a petition for certiorari, it requires a 'subsequent entry of judgment' only when a timely petition for rehearing is granted; no 'subsequent judgment' is required, however, when the petition for rehearing is denied.

In this case, as in *Acevedo, supra,* the denial of the first postjudgment motion should have had terminated the tolling of the time to appeal the July 16, 1997 judgment since it left the underlying judgment intact. In the present case Respondents' *"notice of appeal was not filed until [forty seven] days after the entry of the order denying of [sic] the motion. Thus, even with the benefit of Rule 4(a)(4)'s tolling provisions, plaintiff's notice of appeal was seemingly late. We lack jurisdiction over late appeals"*. Acevedo, *supra,* at 387. (Our emphasis.) This clear and well established substantive rule of appellate jurisdiction cannot be dependent upon *Fiore's, supra,* unqualified application of the procedural technicalities of the "separate document" rule.

The majority of the Circuits, in clear contradiction with the First Circuit, have decided that the "separate document" rule does not apply to denials of postjudgment motions.[2]

ELEVENTH CIRCUIT. The sharpest conflict among these contradicting interpretations of the "separate document" rule exists between the holding in *Fiore, supra,* and the Eleventh Circuit's opinion in *Wright v. Preferred Research, Inc.,* 937 F.2d 1556 (11th Cir. 1991), *cert. denied,* 502 U.S. 1049 (1992). The Eleventh Circuit discarded the applicability of Fed. R. Civ. P. 58 to denials of postjudgment motions as an "interpretation that goes far beyond the scope and purpose of Rule 58" (*Wright, supra,* at 1560). Relying in the Court's holding in *Bankers Trust Co. v. Mallis,* 435 U.S. 381 (1978) (the sole purpose of the separate document requirement . . . was to clarify when the time to appeal begins to run). *Wright, supra,* decides that no separate document is needed even if the district court, when disposing of a post-trial motion, amends the underlying judgment:

> Having rejected the first two options, we believe the third choice, requiring no second separate document when a district court amends a judgment, is the best choice. First, this interpretation does not detract from the certainty that Rule 58 provides. For example, in this case, the time for appeal began to run on July 14, 1988, when the clerk entered the judgment. Pursuant to Fed. R. App. 4(a)(4) the time for appeal

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[2] The Second Circuit has recognized this conflict and has not sided with either view. See *Cooper v. Town of East Hampton,* 83 F.3d 31 (2nd Cir. 1996) at n.3.

was tolled while Preferred's various motions were pending. Once the district court fully disposed of those motions, the time for appeal began to run again. Thus, the combined effect of Fed. R. App. P. 4 and Fed. R. Civ. P. 58 provide certainty regarding when notices of appeals must be filed.

When Rule 59 motions are denied, we require the litigants to use Fed. R. App. P. 4 and Fed. R. Civ. P. 58 to determine the time frame for any notice of appeal they wish to file. We are asking the parties to do no more by declining to require a second separate document when a district court grants a motion to alter the judgment. Indeed, that is all Preferred was required to do in this case. In other words, we believe that if the litigants must follow the simple dictates of Fed. R. App. P. 4 whenever a motion to amend or alter the judgment is denied, then requiring the same thing whenever such a motion is granted in whole or in part does not create 'a trap for the inexperienced'. Second, we hesitate in all cases to interpret a rule to create a result not obviously called for by the language of the rule, especially where there is absolutely no indication of Congress' intent to reach such a result. Therefore, we think the proper rule is that Rule 58 does not require a district court to enter another separate document whenever it amends, remits or in any way alters a judgment that has already been entered once in accordance with Rule 58. Preferred failed to file a notice of appeal within 30 days of the date on which the district court finally disposed of Wright's motion for reconsideration as it was required to do by Fed. R. App. P. 4. Preferred's later notices of appeal were therefore untimely.

> We grant appellee Wright's motion to dismiss appellant Preferred's appeal for lack of jurisdiction. *Wright, supra,* at 1561 (footnotes omitted).

NINTH CIRCUIT. The Ninth Circuit has held that the "separate document" rule applies to *denials* of Fed. R. Civ. P. 59 motions. See *Hollywood v. City of Santa María,* 886 F.2d 1228, 1231 (9th Cir. 1989). Relying in *Beaudry Motor Company v. Abko Properties, Inc.,* 780 F.2d 751 (9th Cir. 1986), *cert. denied,* 479 U.S. 825 (1986), the Ninth Circuit adopted a practical approach in the applicability of Fed. R. Civ. P. 58 in furtherance of the finality and certainty that an underlying judgment entered in compliance with Fed. R. Civ. P. 58 and 79 ought to have. Instead of imposing *Fiore's, supra,* unnecessary requirement of entering a "second separate document" together with the denial of a postjudgment motion, the Ninth Circuit held that a district court order denying a motion under Fed. R. Civ. P. 59 *suffices by itself,* to comply with the "separate document" requirement as follows:

> In the contexts of final judgments, the requirement that the dispositive document be distinct from any opinion serves to eliminate confusion as to which order ends the litigation. See *Bankers Trust Co.,* 435 U.S. at 384, 98 S.Ct. at 1119 ('sole purpose of the separate-document requirement . . . [is] to clarify when the time for appeal . . . begins to run'). No comparable risk of confusion exists with respect to an order denying a motion for new trial where the order is properly entered on the docket sheet.
>
> In this case, as is generally the case in the Rule 59 context, the order denying the motion for new trial definitely signaled the end of the

litigation. See *Beaudry Motor Co.*, 780 F.2d at 755 (Rule 58 separate document requirement satisfied when order denying Rule 59 motion clearly put counsel on notice that motion was denied). The order in this case was entered on the docket as an order denying the motion in compliance with Rule 79(a) and it was properly served on the parties in compliance with Rule 77(d). Accordingly, the 'entry' complied with all of the requirements of the Federal Rules of Civil Procedure and it was not necessary for the district court to file and enter a second document. Rather, appellant's time to appeal ran from the date of entry of the order denying the motion for new trial on the docket. The second notice of appeal, filed over a year later, was untimely. *Hollywood, supra* at 1232, (footnotes omitted).

The reasoning behind said rule is quite simple:

> This holding comports with the purpose of the separate document requirement. That purpose is to avoid the inequity of a party being denied the opportunity to appeal because of a failure to recognize which of several documents or docket entries constituted 'entry' of judgment. In this case, plaintiff's counsel received a document, the sole contents of which informed him that his postjudgment motions had been ordered denied and which was file stamped. We have no trouble concluding that in these circumstances a reasonable person would realize that the court had entered an order finally disposing of the case. *Beaudry, supra,* at 755. (citation omitted)

In our case the denial of Respondent's motion for new trial was duly entered in the docket (See docket entry #624, app. p. 85) and notified, to stop the tolling of

the time to appeal the July 16, 1997 judgment. As the *Wright, supra,* and *Hollywood, supra,* opinions hold, the docket entry, together with the clear language of Fed. R. App. P. 4(a)(4), dictated to Respondent the time it had to file its notice of appeal.

SEVENTH CIRCUIT. Since 1986, the Seventh Circuit in *Charles v. Daley,* 799 F.2d 343, 346-347 (7th Cir. 1986) held:

> As we see it, if the Fund's motion in May 1985 stopped the clock, the appeal is timely. The district judge did not enter an order in October 1985 altering the judgment, and until one was entered on a separate document, the time did not restart . . . A minute order suffices when the judge denies a request to alter the judgment, for then the original judgment remains in effect. Here, however, the original judgment has been amended twice, and until the effective judgment is set forth on a separate sheet of paper, the time is suspended . . . (citations omitted).

This holding was reiterated by the Seventh Circuit in *Wikoff v. Vanderveld,* 897 F.2d 232, 236 (7th Cir. 1990) as follows:

> However, Wikoff's December 6 motion and amended of judgment, filed pursuant to *Rule 59(e),* suspended the finality of the November 28 judgment until the entry of the order disposing of this motion. *Charles v. Daley,* 799 F.2d 343, 347 (7th Cir. 1986). As noted above, on December 6, 1988, the district court granted Wikoff's motion and amended the original judgment *in a minute order,* which was entered on the docket the following day. This was insufficient to comply with the "separate judgment" requirement of Rule 58.

> "A minute order suffices when the judge denies a request to alter the judgment, for then the original judgment remains intact." *Id.* at 347. However, when the court grants a Rule 58(e) motion, thus rendering a "new judgment", *Rule 58* requires that the new judgment be set forth on a separate document.

FIFTH CIRCUIT. In *Marre v. United States*, 38 F.3d 823, 825 (5th Cir. 1994) the Fifth Circuit citing the Eleventh, Ninth and Seventh Circuits adopted the majority view and, making a distinction between orders of the district court that grant post-trial motions and orders denying said motions, held:

> While Rule 58 clearly requires the entry of a separate, written order, courts generally distinguish between the granting of a post-trial motion and the denial of a post-trial motion. When the court grants a post-trial Rule 59 motion, it affects the judgment, and its new ruling becomes the final judgment. As such, Rule 58 requires a written order. By contrast, the denial of a post-trial motion leaves the pre-existing judgment unaffected. Thus, there is no need to issue a new judgment . . . We agree with this approach and deny the government's motion to dismiss. (citations omitted)

FEDERAL CIRCUIT. The Federal Circuit in *Kraft Inc. v. United States*, 85 F.3d 602 (Fed. Cir. 1996) quoting from *Charles v. Daley, supra*, at 348 also distinguished the need to satisfy the "separate document" requirement of Fed. R. Civ. P. 58 when postjudgment motions are granted or denied. In the context of deciding whether a postjudgment motion tolls the time to appeal from an amended judgment the Federal Circuit held as follows:

> Once a district court has denied timely filed tolling motions, the litigants must appeal if they wish to further challenge a judgment, except for the special circumstances recognized in Rule 60(b). How have these rules been interpreted where the district court GRANTS a timely Rule 59 motion, amends its first judgment and enters a second modified judgment? FRAP 4(a) provides that the time to appeal runs anew from the disposition of the tolling motion whether granted or denied. However, when the original judgment is substantially changed the appeal time runs from the date of the entry of the second judgment in accordance with Rule 58. *Kraft, supra,* at 605-606.

The majority view contained in the opinions cited above promotes certainty in the finality of judgments and in the time allowed to the parties to seek appellate review. On the contrary, by means of the automatic application of the "separate document" rule to denials of postjudgment motions, *Fiore, supra,* creates confusion and discards the finality that a judgment has by the application of the plain language of Fed. R. App. P. 4(a)(4).

In *F.T.C., supra,* the Court stated: *"Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle – the principle that litigation must at some definite point be brought to an end."* *F.T.C., supra,* at 213. Having had two jury trials in the present case and after ten years of litigation, the present case must be brought to an end.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

CONSTRUCTORA LLUCH, INC. and
CNA CASUALTY OF PUERTO RICO, INC.,

Petitioners,

v.

PUERTO RICO AQUEDUCT AND
SEWER AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 98-1331

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Plaintiff, Appellant,

v.

CONSTRUCTORA LLUCH, INC., AND
CNA CASUALTY OF PUERTO RICO, INC.,
Defendants, Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Héctor M. Laffitte, *U.S. District Judge*]

Before

Torruella, *Chief Judge*,
Hall,* *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

Carlos A. Rodríguez-Vidal, with whom *Goldman Antonetti & Córdova* was on brief, for appelant.

José M. Biaggi-Junquera, with whom *José Enrique Otero* was on joint brief, for appellees.

February 18, 1999

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* Of the Ninth Circuit, sitting by designation.

TORRUELLA, ***Chief Judge.*** Before the Court is plaintiff-appellant Puerto Rico Aqueduct and Sewer Authority's ("PRASA") appeal from the district court's denial of PRASA's motion for a second partial new trial on damages. At the first partial new trial, the jury awarded PRASA no damages despite an earlier verdict finding defendant-appellee Constructora Lluch, Inc. ("Lluch") to be negligent and in breach of the construction contract between the two. PRASA also appeals from a jury award on Lluch's counterclaims against PRASA for breach of contract and for amounts owed on the contract. For the reasons stated in this opinion, we affirm the judgment awarding Lluch $756,471.59 on its counterclaims, but vacate the judgment awarding PRASA no damages on its claims and remand for a second partial new trial on the issue of damages.

BACKGROUND

This case arises out of the collapse, during construction, of the steel roof structure of the Mayaguez Composting Facility in October of 1989. PRASA entertained bids for the project and eventually awarded the project's design to Lebron Associates, an engineering and architecture firm. In May of 1988, PRASA entered into a construction contract with Lluch to build the facility. Several months later, Lluch subcontracted with Richmond Steel, Inc. ("RSI") to manufacture and install the facility's steel components, including the roof.

The Mayaguez facility was to be a compost treatment plant comprised of a main building to deposit and treat compost and a separate administrative building. The

main building was designed as two adjacent bays with three lines of columns to support two separate steel frame roofs. Among the plans and specifications developed by Lebron was a procedure to be followed for the preparation and consolidation of the soil. Under the procedure, Lluch was required: (1) to place a permanent landfill on the site; (2) to install wicks and pertinent instrumentation; (3) to place a surcharge[1] on the site; and (4) to leave the surcharge undisturbed for a period of seven and a half months. However, before the consolidation of the soil was completed, Lluch removed the surcharge from the soil in order to begin the concrete construction and in order to allow RSI to begin the steel erection.

On October 22, 1989, after RSI had erected a substantial part of the east portion of the steel roof structure, the uncompleted west portion of the steel roof structure collapsed. After the collapse, Lluch removed the collapsed steel frames and debris, began to repair the damaged columns, and continued with construction of the remaining phases of the project, all with PRASA's authorization and under PRASA's supervision. After Lluch had substantially completed the construction of the project – with the exception of the steel roof structure – PRASA demolished the entire project, over Lluch's objection.

On October 10, 1990, this action was filed in United States District Court for the District of Puerto Rico by RSI, seeking monetary and declaratory relief against

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[1] To surcharge soil on a site is to place an eight-foot thick layer of additional dirt on the site in order to put pressure on the soil. This strengthens the soil by forcing additional water out from underneath, thus minimizing any later soil settlement.

PRASA, Lluch, Lebron, and their bonding and surety companies. Several counterclaims, cross-claims, and third-party claims followed, most of which were dismissed before trial. Included in those rulings, the district court dismissed PRASA's cross-claim under Article 1483 of the Puerto Rico Civil Code against Lluch and RSI. *See Richmond Steel, Inc. v. Legal and Gen. Assurance Soc'y, Ltd.*, 825 F.Supp. 443, 445 (D.P.R. 1993).

At the first trial in 1993, some of the parties entered into various stipulations, including the dismissal of original plaintiff RSI. The district court then realigned the parties to continue the trial. As a result, PRASA became the plaintiff, and Lluch, Lebron, and CNA Casualty of Puerto Rico, Inc. ("CNA")[2] remained as defendants. On August 9, 1993, after a twenty-four day trial, the jury, in a special verdict form, found: (1) that Lluch improperly removed the surcharge from the construction site or in some other way breached its contract with PRASA by negligent construction work; (2) that this breach caused the collapse of the roof structure; (3) that this breach caused damages to PRASA; (4) that PRASA's demolition of the remains of the structure was unjustified; and (5) that PRASA suffered $4,587,202.77 in damages as a result of Lluch's breach. With regard to the counterclaims against PRASA, the jury found: (1) that PRASA breached its contract with Lluch; (2) that this breach caused damages to Lluch in the amount of $138,758; (3) that PRASA

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[2] CNA was named in the claims against Lluch only as Lluch's insurer. As Lluch's insurer, CNA joined Lluch in defending against PRASA's claims and now joins Lluch as an appellee in the present appeal.

owed Lluch $617,713.59 for work performed on the contract; and (4) that PRASA owed Lebron $40,148.28 on the contract. As a result of these findings, the jury awarded: (1) $4,587,202.77 to PRASA for Lluch's negligence and breach of contract; (2) $756,471.59 to Lluch on its counterclaims against PRASA for breach of contract and money owed on the contract; and (3) $40,148.28 to Lebron on its counterclaim against PRASA for money owed on the contract.

On October 15, 1993, the district court issued a judgment consistent with the damages awarded by the jury. In an order issued the same day, the district court advised counsel that all post-trial motions were required to be filed or renewed within 10 days of the date of the judgment. On October 21, 1993, CNA and Lluch filed a timely motion for a new trial on PRASA's claims. On November 4, 1993 – twenty days after the entry of judgment – PRASA filed a motion for judgment as a matter of law with regard to Lluch's counterclaims.

On July 27, 1994, the court granted CNA and Lluch's motion for a new trial, subject to PRASA's acceptance of a remittitur. The court concluded that the jury award was excessive in light of the evidence presented. The court then gave PRASA the option of accepting a remitted award of $1,224,000 or a partial new trial on damages. PRASA opted for a new trial.

On March 24, 1995, the court denied PRASA's motion for judgment as a matter of law on Lluch's counterclaims. The court found that the evidence was sufficient to allow a reasonable jury to reach a verdict in favor of Lluch on those claims.

On February 7, 1996, the court set the scope of the partial new trial on damages for PRASA's claims. The court held that the new trial would be limited only to the extent of PRASA's damages at the time of the collapse. The court concluded that, because the jury in the first trial found that PRASA was unjustified in demolishing the structure, damages would be limited to the cost to repair the collapse as of October 22, 1989, the date of the collapse.

At the partial new trial, PRASA presented evidence that the soil conditions at the site were unstable and were experiencing settlement beyond what was expected. PRASA's experts testified that the soil had to be improved in order to repair the collapse, either through placing a new surcharge on the site or by installing piles to support the structure. PRASA's experts testified that only the option of installing piles was feasible, but that it would cost in excess of $6 million to do. Lluch and CNA presented testimony that the soil did not have to be improved to repair the collapse and that it would have cost approximately $500,000 to repair the damage. Lluch and CNA also presented testimony that Lluch intended to absorb the costs of repair and that PRASA was never going to be charged for those costs.

The court instructed the jury: (1) that PRASA was entitled to claim the extent of any damages it suffered at the time of the collapse on October 22, 1989; and (2) that those damages were limited to the cost to repair the collapse. The court also instructed the jury to accept as established facts: (1) that Lluch improperly removed the surcharge or breached its contract in some other way by negligent construction; (2) that this breach or negligence

caused the collapse; and (3) that PRASA's subsequent demolition of the structure was unjustified. The court informed the jury that if PRASA failed to establish the amount of damages caused by Lluch, then PRASA was not entitled to collect any damages. The court then submitted a verdict form to the jury that asked whether PRASA suffered any damages, and if so, the amount of those damages.

On July 15, 1997, the jury returned the verdict form indicating that it found that PRASA suffered no damages. Judgment was entered the next day, ordering that PRASA take nothing from Lluch and CNA.

On August 1, 1997, PRASA filed a motion for a second partial new trial on the issue of damages or for reinstatement of the 1993 verdict. On December 11, 1997, the court entered an Opinion and Order denying PRASA's motion. On December 22, 1997, PRASA filed a motion to alter or amend the December 11, 1997 Opinion and Order. On January 22, 1998, the court denied PRASA's motion to alter or amend by Endorsed Order. The Court photocopied the motion, wrote "Denied" in the margin of the photocopy, and referred the parties to the December 11, 1997 Opinion and Order. On January 27, 1998, PRASA filed a notice of appeal from the July 16, 1997 judgment, the December 11, 1997 Opinion and Order, and the January 22, 1998 Endorsed Order.

DISCUSSION

I. Jurisdiction

Before we reach the merits, we must first address appellees' contention that we lack jurisdiction over

PRASA's appeal. The docket reflects the following chain of relevant events:

- July 16, 1997 – The district court entered judgment awarding no damages to PRASA;
- August 1, 1997 – PRASA filed a Rule 59(b) motion for a second partial new trial on damages or for reinstatement of the prior verdict;
- December 11, 1997 – The district court entered an Opinion and Order denying PRASA's motion for a second partial new trial on damages;
- December 22, 1997 – PRASA filed a motion to alter or amend the December 11, 1997 Opinion and Order;
- January 22, 1998 – The district court denied PRASA's motion to alter or amend by entering an Endorsed Order. The Endorsed Order consisted of a photocopy of PRASA's motion to alter or amend, with a notation in the margin signed by the district judge. The notation stated: "Denied. *See* docket no. 624." Docket No. 624 is the court's December 11, 1997 Opinion and Order;
- January 27, 1998 – PRASA filed its notice of appeal from the July 16, 1997 judgment, the December 11, 1997 Opinion and Order, and the January 22, 1998 Endorsed Order.

Appellees argue that appellate jurisdiction is lacking because PRASA's December 22, 1997 motion to alter or amend the December 11, 1997 Opinion and Order did not toll the time to appeal the judgment or the Opinion and Order. Federal Rule of Appellate Procedure 4(a)(4)(C) provides that the filing of a motion to alter or amend the

judgment under Federal Rule of Civil Procedure 59(e) tolls the time for appeal until the district court issues an order disposing of the motion. Appellees claim that PRASA's motion is not really a motion to alter or amend the December 11, 1997 Opinion and Order because it requested the same relief sought by the motion for a second partial new trial, and did so on the same grounds. Appellees argue that PRASA's motion to alter or amend is really a motion to reconsider the July 16, 1997 judgment. Appellees point out that the motion to alter or amend is, in some places, an exact verbatim copy of the motion for a new trial. Appellees further claim that even the non-verbatim portions merely recast the arguments of the motion for a new trial with the addition of quotations from the trial transcript.

Appellees correctly note that the filing of a motion to reconsider will only toll the time for appeal if the motion is filed no later than ten days after the entry of the judgment from which reconsideration is sought. *See* Fed. R. App. P. 4(a)(4)(F). Appellees claim that since PRASA's December 22, 1997 motion is really a motion to reconsider the July 16, 1997 judgment, it needed to be filed within ten days of July 16, 1997 to have any effect on the time to appeal. In support of this position, appellees cite *Acevedo-Villalobos v. Hernandez*, 22 F.3d 384 (1st Cir.), *cert. denied*, 513 U.S. 1015 (1994). In *Acevedo-Villalobos*, the Court was faced with a situation in which the district court entered a judgment of dismissal and the plaintiffs filed one post-judgment motion within 10 days of the judgment and another post-judgment motion more than 10 days from the entry of judgment. *See id.* at 389-90. Even though the second motion purported to request reconsideration of

the denial of the first motion, the Court found that the second motion was "an obvious attempt to have the district court revisit the legal basis for" the original judgment of dismissal. *Id.* at 390. The Court noted that the second motion requested the same relief that the first motion requested, and did so on the same grounds. *See id.* Therefore, the Court treated the second motion as a motion to reconsider the original judgment of dismissal. *See id.* Because the second motion was untimely as such a motion to reconsider, the Court found: (1) that it did not extend the tolling of the time to appeal the original judgment of dismissal; and (2) that it did not toll the time to appeal the denial of the first post-judgment motion. *See id.*

Appellees argue that the same result should follow in the present case because the December 22, 1997 motion is really a motion to reconsider the July 16, 1997 judgment and because the motion was filed over five months after the July 16, 1997 judgment. From this, appellees argue: (1) that the time to appeal the July 16, 1997 judgment was tolled only by the filing of the Rule 59(b) motion for a second partial new trial and therefore expired on January 11, 1998; (2) that the time to appeal the December 11, 1997 Opinion and Order was never tolled and also expired on January 11, 1998; and (3) that there was no time to appeal the January 22, 1998 Order, because the untimeliness of the motion to reconsider deprived the district court of jurisdiction to decide it.

We cannot accept appellees' contentions. We are faced with a different situation than that presented in *Acevedo-Villalobos*. In that case, the Court found that the

tolling terminated with the denial of the first post-judgment motion. *See Acevedo-Villalobos*, 22 F.3d at 390. In the present case, however, the December 11, 1997 Opinion and Order – the order denying PRASA's first post-judgment motion – did not stop the tolling of the time to appeal the July 16, 1997 judgment because, as discussed below, it was not a "final judgment" in compliance with the "separate document" rule of Federal Rule of Civil Procedure 58.

Federal Rule of Appellate Procedure 4(a)(4) provides that the tolling commenced by the filing of a proper post-judgment motion continues until "the entry of the order disposing of the last such motion outstanding." Fed. R. App. P. 4(a)(4). Subsection (a)(7) states that "a judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. App. P. 4(a)(7). Therefore, in order to halt the tolling of the time to appeal, an order denying a tolling post-judgment motion must comply with Rule 58. *See also Kersey v. Dennison Mfg. Co.*, 3 F.3d 482, 484-85 (1st Cir. 1993) (finding that the tolling of the time to appeal from a certified judgment never stopped because, even though the district court "announced" its denial of a tolling post-judgment Rule 59(e) motion in an order, it never issued a separate document); *Fiore v. Washington Cty. Com. Mental Health Ctr.*, 960 F.2d 229, 233 (1st Cir. 1992) (en banc) (noting Rules 4(a)(4) and 4(a)(7) and stating that those subsections expressly impose Rule 58's separate document requirement on denials of post-judgment motions that toll the time for appeal). Because we find below that the December 11, 1997 Opinion and Order did not comply

with Rule 58, we find that it did not stop the tolling of the time to appeal the July 16, 1997 judgment.

Rule 58 states that "[e]very judgment shall be set forth on a separate document" and that "[a] judgment is only effective when so set forth." Fed. R. Civ. P. 58. In *Fiore v. Washington Cty. Com. Mental Health Ctr.*, this Court held that Rule 58 shall be applied to all final orders denying and granting post-judgment motions under Rules 50(b), 59(b), 59(e), and 60(b). *See Fiore*, 960 F.2d at 232-33; *see also Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 704 n. 12 (1st Cir. 1996) ("[T]he 'separate document' rule does apply to orders denying Rule 59(e) motions."). In doing so, the *Fiore* Court concluded that "technical compliance with the [separate document requirement] is as necessary in the post-judgment context as it is in disposing of the merits." *Fiore*, 960 F.2d at 235. Because PRASA's motion for a second partial new trial was a Rule 59(b) motion, it fits within *Fiore*'s "uniform approach for all orders denying post-judgment motions under Rules 50(b), 52(b) and 59(b) and (e), as well as under Rule 60(b)." *Id.* at 232. Thus, the Opinion and Order denying PRASA's motion for a second partial new trial must comply with Rule 58.

The December 11, 1997 Opinion and Order was a five-page opinion which considered PRASA's motion for a second partial new trial. In the Opinion and Order, the district court addressed and rejected each of PRASA's arguments in turn, using explanatory language to give its reason for each rejection. The Opinion and Order concluded with the following statements: "Accordingly, the Court hereby **denies** the motion for a new trial. **IT IS SO ORDERED**."

Appellees argue that the Opinion and Order, by itself, was a separate document, as contemplated by Rule 58. Appellees claim that the Opinion and Order was originated by the district court as a separate piece of paper and that the Opinion and Order discussed the merits of PRASA's motion for a new trial. Appellees further claim that there was no margin for confusion or uncertainty as to the finality of the order. Appellees cite *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989), for its holding that a separate document was not required to accompany a nine-page order denying a Rule 59 motion for a new trial. In that case, the Ninth Circuit noted that it had previously held that compliance with Rule 58 "requires entry of a document distinct from any opinion or memorandum." *Id.* at 1231 (citing *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Vernon v. Heckler*, 811 F.2d 1274, 1276 (9th Cir. 1987)). The *Hollywood* court then refused to extend this rule to the context of orders denying Rule 59 motions. *See id.* The court found that the risk of confusion regarding finality does not exist in the context of denials of Rule 59 motions for a new trial. *See id.* at 1232. The court held that the order denying the Rule 59 motion "definitively signaled the end of the litigation." *Id.*

In relying on *Hollywood*, appellees make an argument directly at odds with this Court's holding in *Fiore*. In *Fiore*, the Court held that "technical compliance with the [separate document requirement] is as necessary in the post-judgment context as it is in disposing of the merits." *Fiore*, 960 F.2d at 235. The Court recognized that the uncertainty that prompted the separate document rule

would be less likely to occur with respect to post-judgment orders than for initial judgments. *See id.* at 234. Nonetheless, the Court stated that, because some uncertainty will always exist, consistency and clarity would be better achieved by following the rules as written than by trying to distinguish one type of judgment or order from another. *See id.* In footnote 9, the Court stated that *Hollywood* was "at odds with our conclusion that post-judgment motions should be treated identically with judgments on the merits." *Id.* at 235 n. 9. Therefore, appellees' reliance on *Hollywood* is misplaced; we are bound by *Fiore*'s holding that orders denying Rule 59(b) motions are subject to the separate document requirement of Rule 58.

Appellees cannot escape the fact that the December 11, 1997 Opinion and Order was a five-page explanatory opinion denying PRASA's motion that was not accompanied by a separate one-line judgment. This does not comply with the separate document requirement of Rule 58. Several courts have found that detailed opinions similar to the December 11, 1997 Opinion and Order violate the separate document requirement because they were not accompanied by a short separate judgment. *See, e.g., Baker v. Mercedes Benz of North America,* 114 F.3d 57, 60 (5th Cir. 1997) (holding that Rule 58 was not satisfied by an extensive written opinion concluding with the sentence: "This is a final judgment", because there was no separate document judgment); *Barber v. Whirlpool Corp.,* 34 F.3d 1268, 1275 (4th Cir. 1994) (holding that an eleven-page order setting forth findings of fact and conclusions of law and dismissing defendant's post-trial motions did not satisfy the separate document rule); *Clough v. Rush,*

959 F.2d 182, 184-85 (10th Cir. 1992) (holding that the absence of a separate document rendered an order nonfinal, even though the order granting summary judgment was fifteen pages long and contained detailed legal reasoning). We recognize the irony in finding that an Opinion and Order is not an effectively final judgment because it contains pages of explanatory language and reasoning. However, this Court's concerns for certainty and predictability in *Fiore* gave rise to a uniform rule of technical compliance. Consequently, we find that the December 11, 1997 Opinion and Order did not comply with the separate document requirement of Rule 58. Therefore, the December 11, 1997 Opinion and Order did not stop the tolling of the time to appeal the July 16, 1997 judgment.

Even though the December 11, 1997 Opinion and Order was not a final judgment in compliance with the separate document requirement of Rule 58, we nevertheless have jurisdiction over the appeal if the parties are found to have waived the separate document requirement. In *Bankers Trust v. Mallis*, 435 U.S. 381, 386 (1978), the Supreme Court stated that judicial efficiency requires that the parties be able to waive the separate document requirement in order to avoid the pointless exercise of dismissing the appeal only to have it refiled when the district court enters the required separate document. The Court then went on to find waiver in that case because the petitioner (who was the appellee at the circuit level) did not object to the taking of the appeal in the absence of a separate judgment. *See id.* at 387-88. We have previously applied this waiver principle "where both parties waive the requirement and neither party would be prejudiced or

misled by the lack of a separate document." *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *see also Smith v. Massachusetts Dep't of Correction*, 936 F.2d 1390, 1394 (1st Cir. 1991). We have also stated that "the separate document requirement should always be interpreted to prevent the loss of the right to appeal, not to facilitate loss." *Fiore*, 960 F.2d at 236-37 (internal quotation marks omitted).

In the present case, both PRASA and appellees have waived the separate document requirement. PRASA clearly waived the requirement when it filed its notice of appeal in the absence of a true final judgment. *See id.* at 236 n. 10. Appellees waived the requirement by failing to object at any point to the taking of an appeal in the absence of a separate document. To date, appellees have never claimed that no separate document has issued or that this appeal may not proceed because no separate document has issued. Appellees moved to dismiss the appeal for lack of jurisdiction, but this motion claimed that the January 27, 1998 notice of appeal was untimely, an argument which is predicated on the validity and finality of the December 11, 1997 Opinion and Order. Appellees did not raise the separate document issue in any form until the Court denied the motion to dismiss the appeal and specifically inquired about compliance with the separate document rule. Appellees' current position is that the Opinion and Order is a separate document and therefore the notice of appeal was untimely, so appellees do not, even today, object to the taking of an appeal in the absence of a separate document.

Nor does it appear that either PRASA or appellees have been prejudiced or misled by the lack of a separate

document. Appellees apparently did not even suspect that the December 11, 1997 Opinion and Order was insufficient until the Court's request for briefing on the issue. PRASA was not prejudiced or misled by the lack of a separate document because it took steps – in the form of the December 22, 1997 motion to alter or amend and the January 27, 1998 notice of appeal – to ensure that it was not sleeping on its appellate rights. Therefore, under *Bankers Trust*, *Smith*, and *Wang*, we find that the parties have waived the separate document requirement of Rule 58. Consequently, we have jurisdiction over the present appeal even though the December 11, 1997 Opinion and Order was not a valid final judgment in compliance with Rule 58.

II. The District Court's Denial of PRASA's Motion For a Second Partial New Trial on the Issue of Damages

PRASA argues that the district court abused its discretion in denying PRASA's motion for a second partial new trial on the issue of damages. PRASA argues that a second partial new trial should have been granted because: (1) the jury verdict awarding no damages was against the demonstrable weight of the evidence; (2) the district court erred in allowing the jury to redetermine issues already determined by the first jury; and (3) appellees' counsel made improper and prejudicial remarks to the jury during opening and closing statements.

The denial of a new trial is reviewed for abuse of discretion. *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 482 (1st Cir. 1997).

A. Jury Verdict Against the Weight of the Evidence

PRASA first argues that the 1997 jury verdict was against the weight of the evidence because it was inadequate to compensate PRASA for its damages. A verdict may be set aside and a new trial ordered "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Phav v. Trueblood, Inc.*, 915 F.2d 764, 766 (1st Cir. 1990) (citing *Torres-Troche v. Municipality of Yauco*, 873 F.2d 499 (1st Cir. 1989)).

PRASA argues that the clear weight of the evidence at the partial new trial established that PRASA suffered significant damages. The jury in the first trial found that Lluch had been negligent in breaching its contract with PRASA, that Lluch's breach caused the collapse of the structure, and that this breach caused damages to PRASA. While the district court set aside the amount of damages awarded as excessive, it did not set aside the jury's finding of negligence or the jury's finding that this negligence caused PRASA damages. Rather, the district court specifically instructed the second jury to accept those two determinations. Then, the district court set the parameters for the amount PRASA could recover by instructing the second jury that:

> PRASA is entitled to recover an amount which will reasonably compensate it for any damages it had suffered as a result of Lluch's breach of contract or negligence as of the date of the collapse on October 22, 1989. Specifically, PRASA is entitled to recover the cost to repair the collapse.

PRASA argues that the clear weight of the evidence presented at the partial trial showed that it suffered significant damages as of the date of the collapse. PRASA breaks down the cost of repair into two components: (1) the cost of preparing the soil to support the repaired roof structure; and (2) the cost of repairing the roof structure itself. The first component was sought by PRASA as the cost of the stabilization of the soil or the installation of piling support at the construction site. PRASA notes that the first jury determined: (1) that Lluch improperly removed the surcharge from the soil at the construction site or in other ways acted negligently in breaching its contract with PRASA; and (2) that Lluch's improper removal caused the collapse of the roof structure. PRASA argues that the cost of repair must include the cost of stabilization or piling support because it would be futile to attempt to install the roof structure again without first improving or supporting the soil.

In an attempt to prove that the soil at the site must be improved or supported before repair of the structure could begin, PRASA offered the testimony of Engineers Carlos Ortiz, Angel Herrera, and Alan Crumley. Ortiz testified that he conducted soil exploration at the site after the collapse and that he determined that the soil had settled nearly 70 cm, almost twice the settlement expected when the site was originally analyzed in 1986. Ortiz also detected settlement of the concrete columns on which the new roof structure would be installed. Ortiz concluded that because the consolidation and settlement of the soil was ongoing at the time of the collapse, the soil needed to be treated in order to build on it. Herrera, an expert in design, construction and estimates of costs of repairs of

failures or collapses of structures, testified that, at the time of the collapse, the soil at the site was not competent to support the building as designed. Crumley testified that he analyzed the soil in 1995 and found that primary settlements were still occurring and were therefore occurring at the time of the collapse at a rapid rate. Crumley opined that repairing the collapse in 1989 would have required either improving the soil or installing piles.

The district court apparently agreed with PRASA's assertion that the soil had to be improved before the structure could be repaired. Appellees objected to testimony regarding soil improvement measures as beyond the scope of the cost of repairing the collapse, but the court overruled those objections and stated that "to repair he's got to do that."

PRASA attempted to quantify how much it would cost to improve the soil or install piles through Herrera's testimony. Herrera first considered the option of surcharging the soil, but rejected that alternative because of the uncertainty of the settlement. Therefore, Herrera recommended the second alternative: installing piles for support. Herrera testified that properly installing piles for support would require the following steps (and costs): (1) removing portions of the floor slab ($82,500); (2) installing piles ($3,201,000); (3) raising the existing footings ($440,000); (4) installing new footings to connect the piles with the existing footings ($423,835); (5) building concrete foundation beams ($510,044); and (6) building a new floor slab ($1,220,740). Herrera testified that these steps would cost $5,878,119, plus a six percent consulting fee, for a total cost of improving the soil of $6,230,806.

The second component of the cost of repair sought by PRASA was the repair of the roof structure itself. PRASA argues that the evidence of the cost of reinstalling the collapsed roof varied from $470,000 to $2,513,211.48. PRASA first points to the testimony of Lluch's expert, Engineer Rafael Jimenez. Jimenez testified that repairing the roof structure would requiré repairing and installing the steel trusses ($420,000), repairing the concrete columns ($21,000), and removing the twisted steel ($70,000), for a total of $511,000. Engineer Edison Lluch also testified for defendants regarding the cost to repair the collapse. Eng. Lluch agreed with Jimenez that those three steps needed to be undertaken, but disagreed with Jimenez's estimate of cost. Eng. Lluch estimated the steps to cost $421,000, $20,000, and $29,000, respectively, for a total of $470,000.

For the highest estimated cost of repair, PRASA points to the cross-examination of Eng. Lluch, during which PRASA claims that Eng. Lluch acknowledged that he had written a letter to Seaboard Surety Company claiming $2,513,211.48 for repair of the structure. In that letter, PRASA claims that Eng. Lluch included estimates on how much it would cost: (1) to remove the collapsed structure; (2) to replace the damaged steel structure; (3) to install the steel structure; and (4) to repair the damage to the concrete columns. However, Eng. Lluch also testified that much of the claimed amount was not related to the collapse, but was related to the fact that Richmond abandoned the project. PRASA does not itemize the $2,513,211.48 claim to explain how much was claimed by Lluch as repair for the collapse and how much was claimed because Richmond abandoned the project.

In total, PRASA claims that the jury was presented evidence that the soil would cost $6,230,806 to improve and that the steel roof structure would cost anywhere from $470,000 to $2,513,211.48 to repair. PRASA argues that the jury verdict awarding no damages was clearly contrary to the weight of this evidence.

In response, appellees offer two arguments. First, appellees raise the legal argument that PRASA was not legally entitled to compensation for the collapse. Appellees argue that Clauses V and VIII of the construction contract provided PRASA with a choice of remedies in the event of a breach by Lluch. Clause V provided that if Lluch failed in the performance of the contract, PRASA could hire a substitute contractor to complete the work at Lluch's expense. Appellees describe this remedy as the "in natura" remedy for breach of contract. Clause VIII was a penalty clause that obligated Lluch to pay PRASA $1,400 for each day that completion of the project was delayed due to Lluch's failure to fulfill its obligations.

Appellees argue that Clauses V and VIII, in conjunction, provide the only remedies available to PRASA: specific performance or substitute performance, with Lluch paying the liquidated late fees or cost overruns. Appellees cite Article 1106 of the Puerto Rico Civil Code for the proposition that, in obligations that include a penalty clause, the penalty shall substitute indemnity for damages. *See* P.R. Laws Ann. tit. 31, § 3131. Appellees also cite *Rodriguez Cancel v. A.E.E.*, 16 P.R. Offic. Trans. 542 (1995), in support of their argument that, by contracting for the "in natura" remedy, the parties precluded the recovery of monetary damages. Appellees argue that, instead of choosing one of those remedies, PRASA unjustifiably

demolished the entire structure, making it impossible for either Lluch or a substitute contractor to finish the project. From this, appellees claim that PRASA opted out of both remedies available to it, and therefore is not entitled to recover monetary damages now.

We reject appellees' first argument because it ignores the fact that PRASA did not bring its claim solely under a breach of contract theory. Appellees may well be correct that PRASA's remedies for a pure breach of contract action are limited to the remedies provided in the contract. However, while the exact nature of PRASA's claims is not at all clear from the record, this was not a pure breach of contract action. The district court treated the action as a breach of contract action in which the claimed breach of contract was Lluch's negligent construction. The district court asked the first jury: "Do you find that Constructora Lluch improperly removed the surcharge from the construction site or in any other way breached its contract with PRASA by negligent construction work?" Similarly, the district court instructed the second jury to accept as an established fact that Lluch "breached its contract with PRASA by negligent construction work." In numerous instances, the court used hybrid language that makes it clear that it entertained both contract and tort theories and remedies in this case, and properly so. At oral argument, appellees agreed with PRASA that, under *Ramos v. Orientalist Rattan Furniture, Inc.*, 1992 WL 755597 (Puerto Rico 1992), if a party is damaged by acts or omissions that constitute both a breach of contract and a breach of duty, the damaged party may make a tort claim based on the breach of contract. Appellees argue that this was not the case here, but we disagree. Lluch's

negligence breached both the construction contract and its duty not to cause damage to others, so PRASA may seek to recover under either a tort or contract theory.

PRASA attempted to recover damages under a negligence tort theory. Article 1054 of the Puerto Rico Civil Code states:

> Those who in fulfilling their obligations are guilty of fraud, negligence, or delay and those who in any manner whatsoever act in contravention of the stipulations of the same shall be subject to indemnity for the losses and damages caused thereby.

P.R. Laws Ann. tit. 31, § 3018.

Nowhere in the construction contract do the parties agree to limit Lluch's liability for any damages suffered by PRASA due to Lluch's negligence. Consequently, appellees may not assert the contractual limits on breach of contract damages as a bar to PRASA's recovery in this case. In short, the collapse of the roof structure was found to be caused by Lluch's negligent construction and was clearly a reasonably foreseeable consequence of such negligence. Therefore, the cost of repairing the structure following the collapse was properly recoverable by PRASA under a tort theory. *See id.* (providing for recovery of "losses and damages" against those who are negligent in fulfilling their obligations); P.R. Laws Ann. tit. 33, § 3024 (defining "losses and damages" as those foreseen or which may have been foreseen at the time of entering into the obligation).

Appellees' second argument is that PRASA could prove no damages in the amount of the cost to repair the

structure because PRASA would never have incurred any such damages; Lluch would have. The district court instructed the jury that PRASA was entitled to recover any amount which will reasonably compensate it for any damages it suffered as a result of Lluch's breach of contract or negligence as of the date of the collapse on October 22, 1989; specifically, the cost to repair the collapse. Appellees argue that PRASA would never have actually incurred the cost of repairing the collapse, because that amount would have been absorbed by Lluch. Appellees argue that because Lluch had contracted to deliver the completed structure, Article 1481 of the Civil Code allocated to Lluch any loss caused by destruction of the project before delivery. *See* P.R. Laws Ann. tit. 33, § 4122 ("If the person who contracted for the work bound himself to furnish the materials, he shall suffer the loss in case of the destruction of the work before it is delivered, unless there has been a delay in receiving it."). From this, appellees argue that, up until PRASA's unjustified demolition of the entire structure, Lluch was responsible for absorbing the cost of repairing the collapsed structure, not PRASA. Appellees argue that this responsibility disappeared when PRASA demolished the entire structure because Lluch could no longer deliver the completed structure.

We cannot accept this argument as an explanation for how the jury could reasonably have determined, consistently with its duty to follow the court's instructions, that PRASA was entitled to no damages. Appellees' argument regarding the allocation of the burden of the collapse is a strictly legal theory that was never presented to the jury. At oral argument, counsel for appellees was asked

whether this theory was ever presented to the jury. Counsel stated that the theory had been explained in the form of Eng. Lluch's and Jimenez's testimony that the cost of repair was to be absorbed by Lluch and was never to have been invoiced to PRASA. However, the fact that the jury heard testimony regarding Lluch's alleged intent that would give life to appellees' legal theory does not mean that the jury was instructed on the legal theory itself. The jury was specifically instructed that PRASA was entitled to recover the cost of repairing the collapse. The jury was not asked to first determine whether PRASA would have actually suffered the cost of repair if it had not demolished the structure. Appellees do not argue that they objected to this instruction and do not cross-appeal on this issue. In fact, Appellees do not even appear to argue that this portion of the instruction was incorrect. Rather, what appellees seem to argue is that the jury properly awarded no damages despite the existence of this instruction. At oral argument, appellees' counsel was asked whether it was erroneous to instruct the jury that PRASA was entitled to recover the cost of repairing the collapse. Counsel responded that it was not erroneous to do so, but that PRASA failed to prove the amount. As a result of appellees' failure to object, we accept this instruction as correct and as the law of the case.

We are left with a situation in which the court instructed the jury that PRASA could recover the cost of repairing the collapse, and PRASA showed that the cost of repairing the collapse was significant. We do not rule on whether the soil needed to be improved before the structure could be repaired or whether the cost of repairing the roof structure itself was closer to $470,000 or to

$2,513,211.48. We find only that, under any of those theories, the evidence before the jury was that the cost of repair was at least $470,000. Consequently, a verdict of no damages is not consonant with both the instructions given and the evidence presented. We find that the jury abdicated its duty to follow the instructions given by the district court, which resulted in a verdict that is against the clear weight of the evidence. Additionally, we find that it was an abuse of the district court's discretion to deny PRASA's motion for a second partial new trial on the issue of damages. The judgment awarding PRASA no damages is vacated, and we remand for a new trial on the issue of damages.

B. Redetermination of Settled Issues By the Second Jury in Violation of the Seventh Amendment[3]

PRASA also argues that the district court abused its discretion in allowing the second jury, due to misleading jury instructions and verdict forms, to redetermine the issues of Lluch's liability and the existence of PRASA's damages. PRASA claims that these two issues were revisited by the second jury in violation of the Seventh Amendment, which states that "no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

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[3] Because PRASA alleges other errors that would likely reoccur during the partial new trial on remand, we address PRASA's remaining contentions even though we have already vacated the judgment and remanded for a new trial.

We summarily dismiss PRASA's claim that the jury was allowed to redetermine the issue of Lluch's liability. PRASA offers nothing more than the absence of a jury award in support of its argument. However, the jury was specifically instructed: (1) that it had already been established that Lluch was negligent and breached its contract with PRASA; (2) that Lluch's breach caused the collapse of the structure; and (3) that PRASA was entitled to recover any damages it suffered due to Lluch's negligence or breach. In light of these instructions, it simply cannot be said that the 1997 jury was allowed to redetermine the question of Lluch's liability. In fact, the jury was specifically told that this issue had been determined and that they should disregard any testimony to the contrary. Thus, we turn to PRASA's contention that the jury was improperly allowed to redetermine the existence of PRASA's damages.

PRASA argues that the district court violated the Seventh Amendment when it did not set aside the first jury's determination that Lluch's negligence caused PRASA damages, but still allowed the second jury to redetermine the existence of PRASA's damages. PRASA argues that the second jury should only have determined the *extent* of PRASA's damages, not whether PRASA suffered any damages at all. PRASA argues that the second jury was allowed to revisit this issue because the district court: (1) failed to instruct the jury that it was already established that PRASA suffered damages; and (2) specifically instructed the jury that it had the option of finding that PRASA had not suffered any damages.

PRASA cites several cases for the proposition that the Seventh Amendment requires district courts to conduct

successive trials in such a way that the same issue is not reexamined by different juries. Without addressing the questions of whether the authority cited by PRASA adequately demonstrates such a Seventh Amendment principle or whether that principle is applicable in the context of a partial new trial on the issue of damages, we note that no such principle was violated in this case. The district court did not allow the second jury to redetermine the issue of whether PRASA suffered damages. It is true that the second jury was not instructed that it had already been established that PRASA suffered damages. And it is also true that the second jury was instructed that it could fail to award PRASA any damages at all. However, this instruction was given in the context of explaining to the jury that it was PRASA's duty to establish the amount of any damages caused by Lluch's negligence or breach of contract. *See id.* It is neither inaccurate nor an infringement on PRASA's Seventh Amendment rights to instruct the jury that PRASA could not recover any damages if it failed to prove any damages at the partial new trial, whether the previous jury found that PRASA suffered any damages or not. To hold otherwise would be to hold that the jury was obligated to award PRASA damages even if PRASA failed to put on any evidence at all at the partial new trial. This cannot be the case. Thus, the district court did not err in instructing the jury that it could fail to award PRASA any damages at all, despite the first jury's determination that PRASA was damaged by Lluch's negligence.

In short, the district court did not err in failing to order a second partial new trial because of the alleged

reexamination of issues by the second jury. No such reexamination of issues actually occurred.

C. Unfair Influence on the Verdict Through Appellees' Counsel's Prejudicial Comments During Opening Statements and Closing Arguments

PRASA's final contention as to why the district court should have granted a second partial new trial on the issue of damages is that appellees' counsel unfairly influenced the verdict with two impermissible and prejudicial arguments to the jury. PRASA claims: (1) that CNA's counsel made improper reference to the limits of Lluch's insurance policy with CNA during CNA's opening statement; and (2) that Lluch's counsel made improper reference to PRASA's demolition of the structure during Lluch's closing argument.

Absent an abuse of discretion, we will defer to the district court's denial of a motion for a new trial on the basis of improper argument or conduct of counsel. *See Meyers v. Moody*, 693 F.2d 1196, 1220-21 (5th Cir. 1982), *cert. denied*, 464 U.S. 920 (1983); *see also Johnson v. National Sea Prods., Ltd.*, 35 F.3d 626, 631 (1st Cir. 1994). In assessing the effect of improper conduct by counsel, the Court must examine the totality of the circumstances, including the nature of the comments, their frequency, their possible relevancy to the real issues before the jury, the manner in which the parties and the court treated the comments, the strength of the case, and the verdict itself. *See Forrestal v. Magendantz*, 848 F.2d 303, 309 (1st Cir. 1988) (quoting *City of Cleveland v. Peter Kiewit Sons' Co.*,

624 F.2d 749, 756 (6th Cir. 1980)). We reverse only upon a showing of prejudice. *See Gonzalez-Marin v. Equitable Life Assurance Soc'y*, 845 F.2d 1140, 1147 (1st Cir. 1988).

PRASA first complains of CNA's counsel's reference to Lluch's policy limits in CNA's opening statement. PRASA claims that this was done for the sole reason of appealing to jury sympathy. CNA pointed out that Lluch would have to pay most of the millions sought by PRASA from its own funds, because the insurance policy limit was $500,000. However, the parties agree that the insurance policy was admitted into evidence as Joint Exhibit VII. Because the jury could have easily discovered the policy limits for itself, we cannot say that the district court abused its discretion in refusing to grant a new trial on the basis of CNA's improper argument.

PRASA next complains that it was improper for Lluch's counsel to make reference to PRASA's demolition of the structure in his closing argument. However, because PRASA did not make a timely objection to this statement, we review only for plain error. *See Fernandez v. Corporacion Insular De Seguros*, 79 F.3d 207, 210 (1st Cir. 1996); *Johnson*, 35 F.3d at 631 (citations omitted).

We do not find it to be plain error: (1) to allow Lluch's counsel to refer to the demolition of the structure; or (2) to fail to grant a new trial on the basis of such a reference. It was a stipulated fact that the demolition of the structure occurred in the weeks following January 25, 1993. Also, the jury was specifically instructed that it had already been established that PRASA's demolition of the structure was unjustified. In light of the evidence and instructions with which the jury was provided, we do not

believe that Lluch's mention of the demolition during closing argument resulted in any prejudice to PRASA.

In sum, the district court did not err in failing to grant a second partial new trial due to the reference to Lluch's policy limits during CNA's opening statement or the reference to PRASA's demolition of the structure during Lluch's closing argument.

III. Jury Verdict in Favor of Lluch's Counterclaims

PRASA's final argument regards a portion of the 1993 verdict that was not remitted: the award of $756,471.59 in favor of Lluch on its counterclaims for breach of contract and amounts owed on the contract. PRASA complains that this award was also against the weight of the evidence.

A. Preservation of This Issue On Appeal

A motion for a new trial must be made in the first instance before the trial court, particularly where the weight of the evidence is at issue. *See Velázquez v. Figueroa-Gomez*, 996 F.2d 425, 427 (1st Cir.), *cert. denied*, 510 U.S. 993 (1993); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 811 (1st Cir.) (citing 6A Moore's Federal Practice § 59.15[3], at 326-27 (2d ed. 1987)), *cert. denied*, 488 U.S. 955 (1988). The failure to move for a new trial waives the issue on appeal. *See Velázquez*, 996 F.2d at 427; *Wells Real Estate*, 850 F.2d at 811.

PRASA did not move for a new trial on Lluch's counterclaims. However, following the judgment on

Lluch's counterclaims, PRASA filed a two-page motion for judgment as a matter of law on those claims. On October 27, 1995, the district denied PRASA's motion. The district court found that Lluch presented evidence: (1) that PRASA breached the contract; (2) that this breach caused damages to Lluch; and (3) that PRASA owed Lluch monies on the contract. The district court found that the evidence presented was sufficient to allow a reasonable jury to reach a verdict in favor of Lluch on its counterclaims.

While PRASA's failure to file a motion for a new trial would ordinarily require this Court to find that the issue has been waived, the fact that PRASA filed a motion for judgment as a matter of law helps PRASA to avoid that result. In *Velázquez*, the appellants sought to challenge the verdict as against the weight of the evidence. *See Velázquez*, 996 F.2d at 427. We held that, even though the appellants failed to make the appropriate motion for a new trial before the district court, the issue was not waived because the appellants made a motion to set aside or amend the verdict. *See id.* We found that because the purpose of the appellants' motion was to challenge the verdict as against the weight of the evidence, the appellants should not have been deemed to have waived the issue. *See id.* We noted that the district court addressed the sufficiency argument and denied the motion because the jury's verdict was supported by the evidence. *See id.* Consequently, we treated the appellants' motion as a motion for a new trial and treated the appeal as an appeal of the denial of that motion for a new trial. *See id.*

The same situation is presented in the present appeal: (1) PRASA made a motion challenging the verdict as

against the weight of the evidence; (2) the district court addressed the sufficiency argument; and (3) the district court denied the motion because the jury's verdict was supported by the evidence. Therefore, we treat this appeal as an appeal from the denial of PRASA's motion for a new trial on Lluch's counterclaims.

B. Denial of PRASA's Motion for a New Trial on Lluch's Counterclaims

Again, the denial of a motion for a new trial is reviewed for abuse of discretion. *See Bogosian*, 104 F.3d at 482. A verdict may be set aside and a new trial ordered "when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice." *Phav*, 915 F.2d at 766.

PRASA points to the testimony of José A. Toro-Mercado, a certified public accountant who PRASA claims testified on behalf of Lluch that PRASA owed Lluch $2,121,956.35 as a result of change orders, additional work, materials, and extended office overhead. PRASA claims that Toro-Mercado's testimony was based on three main, but faulty, premises: (1) that Lebrón, the designer of the project, was at fault for the collapse of the steel roof structure; (2) that all delays in the construction project were attributable to PRASA; and (3) that Lluch had worked at the project between August 1, 1988 and October 20, 1990.

PRASA argues that the first of these three premises was contradicted by the 1993 jury verdict itself. PRASA claims that the 1993 jury specifically ruled that Lluch, not

Lebrón, was solely liable to PRASA for the negligent removal of the surcharge that caused the collapse of the structure. PRASA argues that the second premise was also contradicted by the 1993 jury verdict and the evidence adduced at trial. PRASA notes that the 1993 jury omitted any finding that PRASA had been solely responsible for the delays in the project. PRASA also claims that all of the evidence regarding job certifications that was presented at trial showed that Lluch or its subcontractors were as much responsible for the delays as was PRASA. PRASA also notes that "the certifications were reconciled during trial by the parties, clearly showing that PRASA was not remotely the sole responsible party for the delays in the project." Regarding the third premise, PRASA argues that there was "better evidence" of the time period of Lluch's presence at the project.

PRASA's argument fails in several respects. First, while the 1993 jury found Lluch to have been liable, it did not find that Lebrón was faultless. The liability of Lebrón was not before the jury, and the jury made no determinations regarding this issue. Second, the "omission" of a finding that PRASA was solely responsible for project delays is hardly a finding that PRASA was not responsible for any delays that may have caused Lluch damages. Third, PRASA does not direct the Court to any of the evidence it claims demonstrated Lluch's responsibility for delay in construction. Fourth, even if the certifications were "reconciled" during trial, PRASA does not explain to the Court how that "clearly show[s] that PRASA was not remotely the sole responsible party for the delays in the project." Fifth, PRASA makes no attempt to identify

the "better evidence" of an allegedly more accurate time period of Lluch's involvement in the project.

Finally, and most importantly, the jury awarded Lluch $756,471.59 on its counterclaims, even though PRASA admits that Toro-Mercado testified that PRASA owed Lluch $2,121,956.35. It is quite possible that the jury questioned Toro-Mercado's three premises and reduced the damages award accordingly. For example, the jury may have reduced the award by the amount it determined that Lluch was at fault for the delays. Or it may have reduced the award because it did not agree that Lebrón was solely at fault for the collapse. Or it may have reduced the award because it believed that the "better evidence" referred to by PRASA demonstrated that Lluch was not on the job as long as it claimed. This is, of course, all speculation, but PRASA does not offer any argument as to why the amount actually awarded was against the weight of the evidence. PRASA offers several arguments that demonstrate why Lluch should not have been granted all it requested, but the fact remains that Lluch was not granted all it requested.

In the jury verdict form, the 1993 jury found: (1) that PRASA breached its contract with Lluch; (2) that this breach caused damages to Lluch in the amount of $138,758; and (3) that PRASA owed Lluch $617,713.59 for work performed on the contract. PRASA does not offer any evidence or argument that Lluch did not in fact suffer damages in the amount of $138,758 or that Lluch was not in fact owed $617,713.59 for work performed on the contract. Consequently, we reject PRASA's claims that the verdict was against the weight of the evidence and leave

undisturbed the judgment in favor of Lluch on its counterclaims.

CONCLUSION

Based on the foregoing, the judgment awarding PRASA no damages is **VACATED**, and this case is **REMANDED** for a new trial on the issue of damages. The judgment awarding Lluch $756,471.59 on its counterclaims for breach of contract and amounts owed on the contract is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No.98-1331

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

Plaintiff, Appellant

v.

CONSTRUCTORA LLUCH, INC., AND
CNA CASUALTY OF PUERTO RICO, INC.

Defendants, Appellees

JUDGMENT

Entered: February 18, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court awarding PRASA no damages is vacated and the cause is remanded to the district court for a new trial on the issue of damages. The judgment of the district court awarding Lluch $756,471.59 on its counterclaim for breach of contract and amounts owed on the contract is affirmed.

By the Court:

/s/ Phoebe Morse
Phoebe Morse, Clerk

[cc: Messrs. Rodriguez-Vidal and Biaggi-Junquera]

United States District Court

FOR THE JUDICIAL DISTRICT OF PUERTO RICO

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

V.

CONSTRUCTORA LLUCH, INC. AND CNA CASUALTY INSURANCE OF PUERTO RICO

JUDGMENT IN A CIVIL CASE

(Filed Jul. 16, 1997)

CASE NUMBER: CIVIL 90-2334 (HL)

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff PUERTO RICO AQUEDUCT AND SEWER AUTHORITY take nothing from defendants CONSTRUCTORA LLUCH, INC. AND CNA CASUALTY INSURANCE OF PUERTO RICO.

July 16, 1997
Date

FRANCES RIOS DE MORAN
Clerk

/s/ Minerva Figueroa
Minerva Figueroa
(By) Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Plaintiff,

Civil No. 90-2334 (HL)

v.

CONSTRUCTORA LLUCH, INC., et al,
Defendants.

OPINION AND ORDER

The long and tortuous litigation path which this case has traveled appears to be coming to an end. Before the Court is Plaintiff Puerto Rico Aqueduct and Sewer Authority's ("Prasa") motion for a new trial pursuant to federal Rule 59. The original trial in this case was held in the summer of 1993. The jury found that Defendants Constructora Lluch and CNA Casualty were liable and returned a verdict in favor of PRASA in the amount of $4,587,202.77. Lluch had brought a counterclaim against PRASA. The jury returned a verdict on this counterclaim in favor of Lluch in the amount of $756,471.59. The Defendants moved for a new trial, and the Court granted the relief, unless PRASA accepted a remittitur of $1,224,000.00. PRASA rejected the remittitur and chose instead to retry the case. In the second trial, Lluch's liability was not at issue. The only issue to be tried was the extent of PRASA's damages as of October 23, 1989, the date of the collapse of the construction project which is the center of this case. After a six-day trial in July 1997,

the jury found that PRASA had not suffered any damages.

PRASA now alleges errors in the second trial that would justify the holding of a third one. Specifically, PRASA argues that the jury instructions and verdict form were erroneous; the verdict was contrary to the weight of the evidence; the second trial should have been continued because of adverse publicity against PRASA; one of Lluch's witnesses should not have been allowed to testify; that Defendants misled the jury in their opening and closing statements; and the cumulative effect of these alleged errors constitutes unfair prejudice. For the reasons discussed below, the Court declines PRASA's request.

The granting of a new trial under Rule 59 is a sparingly-used remedy. *Dall v. Coffin*, 970 F.2d 964, 969 (1st Cir. 1992). A new trial is appropriate when the jury's verdict is so clearly mistaken and so demonstrably against the evidence or the law that it constitutes a manifest miscarriage of justice. *Transamerica Premier Ins. Co. v. Ober*, 107 F.3d 925, 929 (1st Cir. 1997); *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 482 (1st Cir. 1997). The Court has reviewed the record and paid particular attention to the proceedings at the second trial. None of the alleged errors which PRASA mentions are sufficient to meet the burden required for a successful Rule 59 motion. The Court makes the following findings as to PRASA's specific claims.

First, PRASA's chief complaint is that the Court did not instruct the jury that PRASA had to receive some

amount in damages. PRASA objects to the Courts instructions that the jury was to decide what damages "if any" PRASA had suffered as a result of Lluch's breach. *See* docket no. 622, at 112. The Court also instructed the jury that PRASA was entitled to "any damages" it suffered. *See id.* at 111-12. PRASA also objects to the verdict form, which contained the question: "Do you find that PRASA has suffered any damages?" *See* docket no. 609. The jury's response to this interrogatory was "No." PRASA claims that these instructions and the verdict form did not instruct the jury that PRASA had suffered damages.

The Court disagrees with these arguments. The fact that a party is liable for a breach of contract or breach of a duty does not automatically mean that the suffering party is entitled to damages. *See Ruiz-Rodriguez v. Colberg-Comas*, 882 F.2d 15, 17-18 (1st Cir. 1989); *Electric M&R v. Banco Popular de Puerto Rico*, 863 F.2d 1055, 1058-60 (1st Cir. 1988). That is the case here. The first jury trial found that Lluch's negligence or breach of contract caused the damage to the construction project. The Court so instructed the jury in the second trial. Docket no. 622, at 110-12. The Court also instructed the jury that it should disregard any testimony which contradicted these findings from the first trial. *Id.* at 111-12. Thus, liability, was already established. However, PRASA still had to prove its damages. The jury's verdict demonstrates that PRASA failed in this endeavor. It is not within the Court's purview to order a new trial merely because PRASA was unable to convince the jury of its damages.

Second, PRASA also complains that the jury's verdict was contrary to the weight of the evidence. In making

this argument, PRASA cites to the witnesses whose testimony it claims established that PRASA was entitled to damages. The verdict, however, indicates that the jury did not find these witnesses to be credible. A jury is not obliged to credit a witness' testimony. *Fernandez v. Corporatión Insular de Seguros*, 79 F.3d 207, 211-21 (1st Cir. 1996). Thus, the fact that the jury may have chosen not to believe PRASA's witnesses cannot justify a new trial.

Third, PRASA further complains about alleged adverse publicity. PRASA argues that because Puerto Rico was suffering a drought at the time of the trial and sectors of the island were subject to water rationing, negative publicity against PRASA in the media adversely affected its right to a fair trial. PRASA claims that either the second trial should have been continued, it should have been granted additional peremptory challenges, or a more extensive voir dire should have been administered. The Court finds this argument to be baseless. During the selection of the jury, the Court asked the members of the jury pool whether any articles or reports in the media biased them against PRASA. Docket no. 620, at 10-11. Pursuant to a request from PRASA, the Court questioned the pool a second time on this topic. *Id.* at 14-16. After PRASA again raised this issue during the jury selection, the Court individually questioned those particular members of the jury pool which PRASA claimed had been affected by the drought. *Id.* at 26-38. These interrogatories established to the satisfaction of the Court that there was no anti-PRASA bias. Also, at closing the Court instructed the jury not to be swayed by bias or prejudice. Docket no. 622, at 104. PRASA did not object to the Court's instructions and interrogatories regarding any bias against

PRASA. The Court finds that the issue of bias was properly addressed during the second trial. Therefore, this argument does not warrant a new trial.

Fourth, PRASA complains that Rafael Jiménez should have been excluded from testifying. PRASA claims that Lluch waited too long before announcing him as a witness. The Court disagrees. PRASA acknowledges that Lluch identified Jiménez as a witness by January 1997, six months before trial. PRASA took his deposition. Additionally, he testified at the first trial. Therefore, PRASA cannot claim any surprise that this witness would testify. This argument also fails to warrant a new trial.

Fifth, PRASA complains about remarks made by the Defendants in their opening and closing statements. PRASA objected to the opening statement remarks, and the Court overruled the objection. Docket no. 593, at 61-63. For the same reason that the Court overruled the objection, the Court again denied this argument. With regard to the allegedly improper remarks in the closing statements, PRASA did not raise this objection at trial. Even if it had raised the objection, however, this would not have been sufficient to justify a new trial.

In conclusion, the Court holds that the jury's verdict was not clearly mistaken or demonstrably against the evidence or the law. PRASA's arguments individually and cumulatively are not sufficient to show the verdict

constituted a manifest miscarriage of justice. Accordingly, the Court hereby **denies** the motion for a new trial.

IT IS SO ORDERED.

San Juan, Puerto Rico, December 11th, 1997.

/s/ Hector M. LaFeytte
HECTOR M. LAFEYTTE
U.S. District Judge

NO. 98-1331

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PUERTO RICO AQUEDUCT
AND SEWER AUTHORITY

Plaintiff, appellant

v.

CONSTRUCTORA LLUCH, INC.; CNA CASUALTY
OF PUERTO RICO, INC.

Defendants, Appellees

On Appeal from a Judgment of the United States District Court for the District of Puerto Rico

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Appellee's Petition for Rehearing in Banc

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I INTRODUCTION

Now come defendants-appellees Constructora Lluch, Inc. ("Llūch") and CNA Casualty of Puerto Rico, Inc. ("CNA") through their undersigned attorneys, and respectfully request the rehearing, and suggest that it be in banc, of that part of the February 18, 1999 Judgment (hereinafter the "Appeals Judgment") that vacates the July 16, 1997 District Court judgment based on the verdict of the jury and remands the case for a third new trial on the issue of damages.

We express a belief, based on a reasoned and studied professional judgment, that: (A) the panel decision is

contrary to the following decision of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Dimick v. Schiedt*, 293 U.S. 474 (1935); and *Acevedo v. Hernández*, 22 F.3d 384 (1st Cir. 1994) *cert. denied*, 513 U.S. 1015 (1994); and, (B) this appeal involves one or more questions of exceptional importance: (i) the violation of the Seventh Amendment right that no fact tried by a jury shall be otherwise examined by the court; (ii) the jurisdictional authority of this court to entertain appeals of final non-appealable judgments by imposing the technical requirement of Rule 58 F.R. Civ. P. to orders that do not constitute final judgments, i.e., denials of post-judgment motions.

II POINTS OF LAW

Rehearing in banc of the Appeals Judgment is requested on the following points of law:

FIRST: The remand of this case for a third jury trial (a second new jury trial on the issue of damages) violates appellees' rights under the Seventh Amendment of the Constitution that no fact tried by a jury should be re-examined by a court.

SECOND: The treatment that this Honorable Court gives to District Court's dispositions of post judgment motions as if they were appealable judgments requiring compliance with F.R. Civ. P. 58.

III ARGUMENTS

A. Seventh Amendment Right that no fact tried by a jury be re-examined by a court.

The Seventh Amendment to the Constitution provides that: *no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.* The Supreme Court in the case of *Dimick*, supra, decided that the Seventh Amendment forbids the use of an *additur*, i.e., that the allowance of a motion for new trial be conditional upon the refusal of the defendant to *an increase* in the amount of damages. The crux of the decision was that an increase by the court to the amount decided by the jury was a *bold addition of something which in no sense can be said to be included in the verdict*. Consonant with the allocation of the fact finding power in the jury, a court can not find as a fact the existence of an amount of damages beyond that found to exist by the jury.[1] When the court reduces the amount of a jury verdict through a *remittitur* it "is adopting" facts that have been included in the jury verdict; in such a case the factual determination of the "amount of damages" was determined by the jury within the verdict. However, if the amount of damages propounded by the court is beyond the verdict amount, such increase was not a fact

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[1] This Honorable Circuit has already decided that the ability of an appellate court to review and increase the damages awarded by a jury recognized by the Supreme Court in *Gasperini v. Center for Humanities Inc.*, ___ U.S. ___, 116 S.Ct. 2211, 135 L. Ed. 2d 659 (1996) is dependent upon the recognition of said ability by local law, and that Puerto Rico law does not allow for said revision. See *Mejias Quiros v. Maxxam*, 108 F.3d 425 n. 1 (1st Cir. 1997).

decided by the jury – it would be a fact *added* by the court contrary to the Seventh Amendment limitation.[2]

When the jury verdict is for a certain amount of damages there exists a constitutional spectrum for the trial court to intervene, always within the confines of the jury's finding of damages, to ascertain the weight of the evidence in reviewing a denial of a motion for new trial. To the contrary, when the verdict does not include any amount, as in our case, there is no constitutional leeway for the court to evaluate the evidence presented to the jury since it necessarily follows that the jury did not give any credibility or weight to it. The jury simply made a determination that no fact was established to award any amount of damages.

To intervene with the jury verdict this Honorable Court found that Eng. Edison Lluch testified that – although it would not be paid by PRASA – the cost to repair the collapsed structure would be $470,000. Under the prohibition of *Dimick*, supra, against an *additur*, this Honorable Court could not have conditioned the granting of the third new trial upon appellees' acceptance of an added verdict of $470,000. Nevertheless, the Appeals Judgment has the effect of circumventing the constitutional prohibition of ordering an *additur* by, instead,

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[2] This Circuit has interpreted an exception to the constitutional rule against "additur" in a case where the jury determined liability and there was no valid dispute as to the amount of damages, in such a case the court would simply grant a summary judgment on the question of damages. *Decato v. Travellers Insurance Company*, 379 F. 2d 796 (1st Cir. 1967). This exception is not applicable to our case where the damages are disputed.

directly ordering a new trial and interpreting that under any of the evidence of damages before the jury the cost of repair was at least $470,000. We respectfully submit that the Seventh Amendment and *Dimick*, supra, impede the remand for a new trial based on a finding of fact of damages made by this Honorable Court greater than the fact as to amount of damages made by the jury – to be zero. Following the reasoning in *Dimick*, supra, it cannot be held that the jury included as a matter of fact any amount in the verdict, *it was zero.*

The jury award of zero damages is in the extreme of the pendulum of possible jury awards and leaves no margin for interpretation or judicial intervention with the jury's award of credibility to the witnesses or the weight of the evidence presented by PRASA. In ordering a new trial this Honorable Court is really deciding that the jury was bound to give credibility to the evidence of damages presented by PRASA – precisely what the Seventh Amendment bars, the Court re-examination of the fact decided by the jury that PRASA suffered no damages.[3]

In *Mayo v. Schooner Capital Corp.*, 825 F.2d 566 (1st Cir. 1987), this Honorable Court recognized the delicate power of reviewing the district court's denial of a new trial on the ground that the verdict is against the clear weight of the evidence as follows: *Our review of this*

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[3] This Court has consistently upheld cases of zero damages and correctly interpreted that the jury had found that the plaintiff had failed to meet the burden of proof of damages. *Quiñones v. American*, 979 F.2d 1 (1st Cir. 1992); *Poulin v. Chrysler Corporation*, 861 F.2d 5 (1st Cir. 1988); and *Ruiz-Rodriguez v. Colberg-Comas*, 882 F.2d 15 (1st Cir. 1989).

decision is necessarily circumscribed first, by our operation of the district court's superior ability to monitor the conduct of the trial and assess the credibility of witnesses, and second, by the jury's constitutionally sanctioned role as finder of fact. Further in the case of *Doop v. Pritzker*, 38 F.3d 1239 (1st Cir. 1994) this Court stated that: a *reviewing court will not tinker with the jury's assessment of money damages as long as it does not fall outside the broad universe of theoretically possible awards that can be said to be supported by the evidence.* The jury's judgment on the appropriate amount of damages to be awarded is rarely overridden – *Brown v. Freedman Baking Co.*, 810 F.2d 6 (1st Cir. 1987). It constitutes an error for the appellate court not to defer to the discretion of the trial court regarding motions for new trial. *This is especially true where the motion for new trial is made because the jury's verdict allegedly is against the weight of the evidence . . . That is the sort of decision most appropriately left to the board discretion of the trial court, because it is directly predicated on the facts and the evidence adduced at trial and because a jury's verdict on the facts should only be overturned in the most compelling circumstances. Wells v. Greate Lowell*, 850 F.2d 803, 810-11 (1st Cir. 1988) quoting from *Allied v. Daiflon*, 449 U.S. 33, 36 (1980); and *McDonough v. Greenwood*, 464 U.S. 548, 556 (1984). The Supreme Court has adverted that where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous, *Anderson v. Bessemer City*, 470 U.S. 1564 (1985).

In the December 11, 1997 Opinion and Order (hereinafter the "Opinion and Order"), the district court concluded that the jury verdict of no damages demonstrated that PRASA had failed to prove the damages as well as

that the witnesses presented were not credible. The district court did not abuse its discretion in concluding that the fact that the jury may have chosen not to believe PRASA's witnesses cannot justify a new trial.

PRASA basically relied on the theory of Eng. Angel Herrerra to prove its claim for damages. A theory that was hypothetical, speculative and based on fantasy. In layman terms we can summarize it as follows:

> "Although we have not paid any amount to anyone, and the amount of damages we claim exceeds the sums that we had paid to the contractor for all the work done until the time of the collapse, we claim that we are entitled to be compensated for the cost to install piles to improve the construction site in order that the collapsed roof structure could be repaired with the contractor's insurance proceeds. The structure that supposedly was to be repaired no longer exists because we demolished it without justification but we are going to build a different structure in the same site without the use of piles."

To support such illusory theory PRASA did not present evidence of any payment of any amount to anyone. Can a reasonable jury credit such a theory of damages? Rightfully, the jury in our case did not.[4]

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[4] "The rule is well settled that expert opinion testimony, even if not directly contradicted, is not ordinarily binding on a jury . . . (citations omitted) The rule is particularly apropos in a case where the expert's testimony, read in the larger context of the evidence as a whole, lacks great convincing force". See *Quiñones*, supra, at 5.

The testimony of Eng. Angel Herrera to support such theory was contradictory and confusing. During direct examination, the Court asked Eng. Herrera:

> *Let me have this clear for jury,*
>
> *In other words, had PRASA repaired the collapse, what would have been the cost. That is the issue in this case, whatever damages PRASA suffered had it repaired rather than demolished. That's the issue.*
>
> *Answer: What I considered was the cost of improving the soil, not really repairing the collapse in the sense that – and it is stated in the letter that I wrote to PRASA – that the cost of repairing the collapse could be paid by the insurance company with no cost to PRASA. It was just to reinforce and improve the soil so it could be able to support the loads.* (T.R. of July 10, 1997 at page 56)

This limited scope of his opinion was reiterated during cross examination when he admitted that the purpose of his report was to obtain a technical solution to the improvement of the soil and establish a cost estimate for that purpose only (T.R. of July 10, 1997 at page 115); that *he was trying to establish the cost to improve the soil, not the repair of the collapse* (T.R. July 10, 1997 at page 147); and, that the preparation of any cost estimate to repair the collapse was out of the scope of his study (T.R. July 10, 1997 at page 126). He further admitted that any opinion he might have had regarding further settlements of the soil *would be based only on conjecture and speculation* (T.R. July 10, 1997 at page 92); that the structure as designed, did not meet the code requirements (T.R. July 10, 1997 at page 92); *that the cost to improve the soil was not related to the cost to repair the collapse* (T.R. July 10, 1997 at page 125)

and acknowledged that, if the soil did not need to be improved, his estimate of cost would not apply (T.R. July 10, 1997 at page 139).

Besides those contradictions Eng. Herrera was irremediably impeached with prior testimony regarding the point in time as to which his opinion referred to: it was as of the time of demolition two years after the collapse, rather than at the time of the collapse (T.R. July 10, 1997 at pages 119 to 125). This contradictory testimony was of utmost importance to the applicability of his theory to the facts of the case, since the issue of damages was to be decided as of the date of the collapse and not when the structure was demolished by PRASA two years later.

To controvert PRASA's theory of damages Lluch presented the testimony of two expert engineers: Eng. Gabriel Fernández, a geotechnical engineer, and Eng. Rafael Jiménez, a structural engineer. Both opined that nothing had to be done to the soil in order to be able to repair the damaged structure (T.R. July 14, 1997 at page 46 and T.R. July 11, 1997 at page 40). It is obvious that the jury accepted these opinions as correct and rejected Eng. Herrera's theory.

In deciding that PRASA suffered no damages the jury could also reasonably have given credibility to the UNCONTROVERTED testimonies of both Eng. Edison Lluch, President of Lluch (T.R. July 14, 1997 at page 66), and Eng. Rafael Jiménez (T.R. July 14, 1997 at page 55), that the amounts needed to repair the collapse *were to be paid by Lluch and were not going to be billed to PRASA at any time and that Lluch was bound by the contract to complete the*

construction of the structures at its own cost. These uncontroverted testimonies, together with the admission from Eng. Angel Herrera that *the cost of repairing the collapse would be paid by the insurance company with no cost to PRASA,* supra, and PRASA's failure to present any evidence of payment of any amount to anyone, could reasonably convince the jury to decide, as a fact, that PRASA had not suffered any damages.

Besides the foregoing credibility matters that were expressly addressed and assessed by the district court's 'superior ability' (See *Mayo,* supra) in the Opinion and Order, it is also possible that, after being instructed about Lluch's defense theory regarding PRASA's failure to comply with the remedial provisions of the contract (T.R. July 15, 1997 at page 113), the jury analyzed Sections VI and VIII of the contract admitted by stipulation as a joint exhibit and found, as a matter of fact, that PRASA did not pursue the remedies afforded to it and was therefore precluded from being otherwise compensated.

All of the foregoing references to the evidence presented at trial demonstrate that the jury's award of zero damages falls comfortably *"within the universe of possible awards that are supported by the evidence". Clark v. Taylor,* 710 F.2d 4, 14 (1st Cir. 1983). *"There were, then, myriad possibilities from which the [reasonable] jurors could choose . . . No more was exigible to ground a take-nothing verdict".* See *Quińones,* supra, at 5.

The instructions to the jury regarding the recovery of damages against Lluch covered the liabilities under both the breach of contract and general tort theories (T.R. July 15, 1997 at pages 112 to 115). This Honorable Court, after

acknowledging that *the exact nature of PRASA's claims is not at all clear from the record* (page 24 of the Appeals Judgment), discussed the possibility that PRASA followed this case under both a breach of contract and tort theories. PRASA had the burden of proving to the jury the exact nature and extent of the damages it was claiming, whether they were arising or caused by Lluch's breaches of contract or otherwise by the breach of general tort liability. Undoubtedly, PRASA choose to submit its claim for damages pursuant to the verdict of the first trial that found liability of Lluch by improperly removing the surcharge and by breaching its contract with PRASA by negligent construction work; however, the important issue is not *under which theory of damages PRASA pursued its claim but whether or not under any theory it met the burden of proving the damages.* The jury found it did not.

The Appeals Judgment quoted Article 1054 of the Puerto Rico Civil Code (31 L.P.R.A. Sec. 3018) as the statute under which PRASA attempted to recover under a negligence tort theory. This is not the applicable provision of the Civil Code to tort actions, the court being Article 1802 (31 L.P.R.A. Sec. 5141). If this Honorable Court were to apply Article 1054 that pertains to breach of contractual obligations to PRASA's claim, it would have to also apply Articles 1059 and 1060 (31 L.P.R.A. Sec. 5073 and 3024) that define the recoverable losses as those actually suffered, loss of profits and damages which may have been foreseen at the time of entering into the obligation. In our case, the foreseen damages were those provided in Section VI and VIII of the contract, with the

resulting preclusion of recovery of monetary damages beyond the liquidated penalty clause for delay.[5]

The remand of this case for a third jury trial on the issue of damages not only disrupts the civil jury system allowing for a re-trial of facts already decided by the second jury, but presents anomalous possibilities as to what evidence of damages is PRASA going to be allowed to present in the third trial that places Appellees in an extreme unfair position to litigate again.

PRASA presented two different theories of damages in the first and second jury trials: in the first, PRASA claimed the restitution of the amounts paid to Lluch until the date of the collapse plus administrative costs; in the second, the cost to improve the conditions of the terrain with the installation of piles. What theory of damages and evidence is PRASA going to be allowed to present in the third trial: the same as presented in the first or in the second trial or a different one? If it is going to *be the same as that of the first jury trial* it would be a tacit reversal of the district court's unappealed determination in the first trial that PRASA failed to present any evidence of damages. If it is going to be *the same as that presented in the*

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[5] Contrary to the holding of the Appeals Judgment limiting the applicability of Sections VI and VIII of the contract to the 'breach of contract claim' and not to the 'general tort claim' Puerto Rico's law regarding the applicability of penal clauses does not recognize that distinction, rather it establishes that once said clause is agreed by the parties it substitutes *all* possible compensations. See *CM & Finance v. Cooley*, 3 T.P.R. 9 (1974). Additionally, the test of clause VI of the contract specifically includes the term "negligence" in the events it was contemplated to cover.

second jury trial it will give PRASA a "second turn" to present to a third jury the same evidence that was discarded by the second jury with the advantage for PRASA of knowing beforehand the weakness of its theory as well as the manner in which PRASA's star expert witness will be impeached. If it is allowed to present a totally new theory of damages then it will constitute an acknowledgment that both the theory and evidence of the prior trials were not sufficient or credible.

The verdict of no damages operated as a dismissal on the merits of PRASA's claim for damages, as such, the July 16, 1997 judgment did not have any adverse pronouncement against Lluch to be appealed. However, this Honorable Court found that the "least amount of damages" established in the second trial was ($470,000.00). This "after the verdict finding" deprived appellees from the right to appeal said factual determination. For example, Appellees could have appealed the judgment alleging: first, that the *remittitur* ordered after the first trial was erroneous since PRASA had not presented *any evidence of damages;* second, that PRASA's claim under a theory of tort was *barred by the one-year statute of limitations applicable to claims under the general tort theory*[6] and, third, that the district court erred in excluding evidence of PRASA's failure to mitigate the damages. Moreover, if

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[6] Appellees requested the dismissal of PRASA's tort action under the one year statue of limitations in their F. R. Civ. P. Rule 50 motions at the conclusion of PRASA's case in chief (T.R. July 10, 1997 at page 205 et seq.) and it was renewed at the end of trial (T.R. July 15, 1997 at page 3 et seq.).

the *Dimick* rule against *additur* was not going to be followed by this Honorable Court, Lluch could have appealed the verdict of the first jury awarding only *$756,471.59* of a total evidence of damages of *$2,121,956.35* presented by Lluch.

B Jurisdiction on Appeal.

Jurisdiction in this appeal is exercised upon the finding that the Opinion and Order did not comply with the separate document requirement of Fed.R.Civ.P. 58 and therefore did not stop the tolling to appeal the July 16, 1997 judgment. Relying in *Fiore v. Washington*, 960 F.2d 232 (1st Cir. 1992), the Appeals Judgment at page 11 holds that the absence of a separate document distinguished our case from *Acevedo*, supra, as follows:

> "We cannot accept appellees' contentions. We are faced with a different situation than that presented in *Acevedo-Villalobos*. In that case, the Court found that the tolling terminated with the denial of the first post-judgment motion. *See Acevedo-Villalobos*, 22 F.3d at 390. In the present case, however, the December 11, 1997 Opinion and Order – the order denying PRASA's first post-judgment motion – did not stop the tolling of the time to appeal the July 16, 1997 judgment because, as discussed below, it was not a "final judgment" in compliance with the "separate document" rule of Federal Rule of Civil Procedure 58."

We have reviewed the docket entries of *Acevedo*, supra, in the district court (see addendum) and found that *as in our case*, the District Court disposed of the first post-judgment motion with an opinion and order that

was dully docketed, (see docket entry #39) with *no separate document being subsequently filed or entered.* With these procedural facts, this Honorable Court found in *Acevedo,* supra, that it lacked appellate jurisdiction because the tolling of the time to appeal *'terminated with the denial of the first post-judgment motion'.* In our case, however this Honorable Court has selectively required a separate document regarding the Opinion and Order to stop the tolling of the time to appeal the July 16 judgment. For the reasons we explain below, the holding of *Acevedo,* supra, not *Fiore,* supra, should control in the present case.

The exercise of appellate jurisdiction over the present appeal by this Honorable Court rests in *Fiore's,* supra, holding that orders denying post-judgment motions are separate, appealable judgments that must comply with F.R.Civ.P. 58. From the opinions of other circuits that we have found that this Circuit stands alone in applying the separate document rule to denials of post-judgment motions.[7] Additionally, the majority view among other circuits, as this Honorable Court recognized in *Fiore,* supra, at n. 8, regarding the conceptualization of these denials is that they are not appealable separate judgments, but rather orders that could be *reviewed* together with the appeal of the underlying judgment. As the Seventh Circuit has put it: *An order denying a Rule 59 motion, though "final" in the sense that it winds up the proceedings in*

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[7] See *Marre v. U.S.* 38 F.3d 823, 825 (5th Cir. 1994); *Wikoff v. Vanderveld,* 897 F.2d 232, 236 (7th Cir. 1990), quoting from *Charles v. Daley,* 799 F.2d 343, 347 (7th Cir. 1986); *Hollywood v. City of Santa Maria,* 886 F.2d 1228, 1232 (9th Cir. 1989); *Wright v. Preferred,* 937 F.2d 1556 (11th Cir. 1991), *cert. denied,* 112 S. Ct. 915; *Kraft Inc. v. U.S.,* 85 F.3d 602 (Fed. Cir. 1996).

the district court and thus clears the way for an appeal . . . is not we think the "final judgment" in the case within the meaning of Rule 58. Rather, it renders the final judgment, presumably entered in accordance with Rule 58 that the movant was seeking to change or set aside an appealable final judgment. Chambers v. American, 990 F.2d 317, 318 (7th Cir. 1993).

The three opinions cited by this Honorable Court in the Appeals Judgment (at page 15) to distinguish the majority view embodied in the opinions cited in footnote (7) below, from *Fiore*, supra, are inapplicable to the procedural facts of our case. Neither *Baker v. Mercedes Benz*, 114 F.3d 57 (5th Cir. 1997) nor *Clough v. Rush*, 959 F.2d 182 (10th Cir. 1992) apply the separate document rule to orders denying post-judgment motions. Both cases applied the separate document rule, rather, to the District Court's initial disposition (the underlying judgments) in each case. Moreover, the Fifth Circuit had rendered the opinion in *Baker*, supra, has followed the majority of the circuits' rule *not requiring* a separate document for denials of post-judgment motions. (See *Marre*, supra, at 825). Even though, the Fourth Circuit in *Barber v. Whirpool*, 34 F.3d 1268 (4th Cir. 1994) applied the separate document rule to an order ruling on a post-judgment motion, it was under a different procedural scenario from that of our case; in *Baker*, supra, the district court *announced in open court* that it was going to issue a written, separate document.

The holding of the Appeals Judgment finding that this Honorable Court has jurisdiction over this appeal contradicts *Acevedo*, supra. the reliance that the Appeals Judgment places in *Fiore's*, supra, minority view imposing

the technicality of applying the separate document rule to the denial of PRASA's first post-judgment motion (the Opinion and Order), is contrary to the finality that the July 16 judgment ought to have under *Acevedo*, supra.[8]

Fiore, supra, requires the applicability of the separate document rule to *all* orders disposing of post-judgment motions. (See *Fiore*, supra, at 231.) We can concede that if in the disposition of some post-judgment motion the underlying judgment is significantly altered, that order should comply with the separate document rule. The reason being that the changes to the underlying judgment could create a genuine controversy over which District Court action is indeed the entry of the final judgment: the original judgment or its subsequent amendment. Rule 58 F.R.Civ.P. was precisely intended to overcome this ambiguity. We respectfully invite this Honorable Circuit to revisit *Fiore*, supra, and suggest that it be modified to require a separate document with an order disposing of a post-judgment motion only if the following practical test is met: *"the question is whether the lower court, in its second order, has disturbed or revised the legal rights and obligations which by its prior judgment, had been plainly and properly settled with finality"*. (See *F.T.C. v. Minneapolis-Honeywell,*

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[8] In *Acevedo*, supra, this Honorable Court decided an issue directly related to the requirements of Rule 58 F.R.Civ. P. – whether the dismissal of a complaint, which did not explicitly dismissed the action, constituted a final decision and was therefore appealable. Even though it was decided in the affirmative, and having cited the *Fiore*, supra, opinion in the text of the *Acevedo*, supra, opinion, this Honorable Court did not apply the separate document rule in the denial of the first post-judgment motion in *Acevedo*, supra.

344 U.S. 206, 249 (1952) applying this standard in an analogous set of facts.)

However, when the District Court's disposition of a post-judgment motion leaves the underlying judgment intact no doubt exists as to which District Court action constitutes the appealable judgment since only one would exist: the underlying judgment. In this instance, the uncertainty protected by Rule 58 F.R.Civ.P. would simply not arise (See opinions cited in footnote seven above.) In our case, as this Honorable Court decided in *Acevedo,* supra, the denial of the first post-judgment motion terminated the tolling of the time to appeal the July 16, judgment; it left the underlying judgment intact and Appellant could have had not doubt as to which judgment it had to appeal. In the present case Appellant's *"notice of appeal was not filed until [forty seven] days after the entry of the order denying of the motion. Thus, even with the benefit of Rule 4(a)(4)'s tolling provisions, plaintiff's notice of appeal was seemingly late. We lack jurisdiction over late appeals". Acevedo,* supra, at 387. (Our emphasis.)

WHEREFORE, it is respectfully suggested that this petition for rehearing is decided in banc and the Appeals Judgment is vacated and/or the appeal is denied for lack of appellate jurisdiction.

CERTIFICATE OF SERVICE

I hereby certify that this March 22, 1999, a copy of the foregoing motion were served upon Carlos A. Rodriguez Vidal, Esq., P.O. Box 70364, San Juan, Puerto Rico, 00936-8364.

Respectfully submitted,

In Mayaguez, Puerto Rico, this March 22, 1999.

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NO. 98-1331

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

Plaintiff, Appellant

v.

CONSTRUCTORA LLUCH, INC.;
CNA CASUALTY OF PUERTO RICO, INC.

Defendants, Appellees

On Appeal from a Judgment of the United States District Court for the District of Puerto Rico

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Addendum to Appellee's Petition for Rehearing in Banc

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Proceedings include all events,
3:92cv1972 Acevedo-Villalobos, et al v. Hernandez-Colon, et al FILE CLOSED

U.S. District Court
Puerto Rico (San Juan)

CIVIL DOCKET FOR CASE #: 92-CV-1972

Acevedo-Villalobos, et al v. Hernandez-Colon, et al

Filed: 07/15/92

Assigned to:
Judge Jaime Pieras, Jr.

Jury demand: Plaintiff
Demand: $23,000,000
Nature of Suit: 442
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

7/15/92	1	COMPLAINT w/attachs. Filing Fee $120.00 Receipt #63344 (ma) [Entry date 08/04/92]
7/15/92	–	SUMMONS issued (ma) [Entry date 08/04/92]
7/20/92	–	SUMMONS issued (su) [Entry date 07/30/92]
8/21/92	2	MOTION by Rafael Hernandez-Colon, Reinaldo Hernandez-Berrios, Manuel Lopez-Rodriguez, Rosaura Gonzalez-Rucci to extend Time to 30 days to answer complaint (il) [Entry date 08/24/92]
8/24/92	–	ENDORSED ORDER granting [2-1] motion to Extend Time to 30 days to answer complaint, set Answer deadline to 9/15/92 for Reinaldo Hernandez-Berrios, for Manuel Lopez-Rodriguez, for Rosaura Gonzalez-Rucci, for Rafael Hernandez-Colon (clerk) (il)
8/31/92	3	MOTION by Antonio Santiago-Vazquez to Extend Time to 30 days to answer

		complaint and 20 days thereafter to answer interrogatories (il) [Entry date 09/01/92]
9/1/92	–	ENDORSED ORDER granting [3-1] motion to Extend Time to 30 days to answer complaint and 20 days thereafter to answer interrogatories, reset Answer deadline to 9/15/92 for Antonio Santiago-Vazquez (Clerk) (il)
9/9/92	4	MOTION by Hermenegildo Ortiz-Quinonez to Extend Time until Oct. 8, 1992 to answer complaint and 20 days thereafter to answer interrogatories (il) [Entry date 09/11/92]
9/11/92	–	Case file ref. to (RSM) on 9-11-92. (il)
9/11/92	5	MOTION by Norma Perez-Giraud to Extend Time until 10-10-92 to answer complaint and 20 days after answer complaint to answer interrogatories served upon deft. (su) [Entry date 09/16/92]
9/15/92	6	MOTION by Rafael Hernandez-Colon, Reinaldo Hernandez-Berrios, Manuel Lopez-Rodriguez, Rosaura Gonzalez-Rucci, Antonio Santiago-Vazquez to Extend Time until 10-15-92 to answer complaint (su) [Entry date 09/17/92]
9/16/92	–	Case ref to JP dkt #4 & 5 (su)
9/21/92	7	ORDER granting [4-1] motion to Extend Time until Oct. 8, 1992 to answer complaint and 20 days thereafter to answer interrogatories, set Answer deadline to 10/8/92 for Hermenegildo Ortiz-Quinonez granting [5-1] motion to Extend

		Time until 10-10-92 to answer complaint and 20 days after answer complaint to answer interrogatories served upon deft., set Answer deadline to 10/13/92 for Norma Perez-Giraud (signed by Judge Jaime Pieras Jr.) (ai) [Entry date 09/25/92]
9/21/92	8	ORDER granting [6-1] motion to Extend Time until 10-15-92 to answer complaint, set Answer deadline to 10/15/92 for Reinaldo Hernandez-Berrios, for Antonio Santigao-Vazquez, for Manuel Lopez-Rodriguez, for Rosaura Gonzalez-Rucci, for Rafael Hernandez-Colon (signed by Judge Jaime Pieras Jr.) (ai) [Entry date 09/25/92]
9/25/92	–	Case file ret. from (JP) with Order #8. (ai)
9/25/92	9	MOTION by Jack Kemp, Rosa C. Villalonga, Raymond A. Harris, Housing & Urban Adm., USA to Extend Time until Oct. 29, 1992 to file responsive pleading (il) [Entry date 09/28/92]
9/28/92	–	Case file ref. to (RSM) on 9-28-92. (il)
9/29/92	–	ENDORSED ORDER granting [9-1] motion to Extend Time until Oct. 29, 1992 to file responsive pleading, set Answer deadline to 10/29/92 for Jack Kemp, for Rosa C. Villalonga, for Raymond A. Harris (signed by Magistrate Judge Roberto Schmidt-Monge) (ai) [Entry date 09/30/92]
9/30/92	–	Case ret. from RSM with Endo #9. (ai)

10/7/92	10	MOTION to Intervene. Response due 10/20/92. (su) [Entry date 10/13/92]
10/21/92	–	CASE REFERRED TO JUDGE PIERAS (DKI #10). (ni)
10/27/92	11	MOTION with Memorandum in Support by Rafael Hernandez-Colon, Hermenegildo Ortiz-Quinonez, Norma Perez-Giraud, Rosaura Gonzalez-Rucci, Reinaldo Hernandez-Berrios, Manuel Lopez-Rodriguez, Antonio Santiago-Vazquez to Dismiss, and/or for Summary Judgment. Response due 11/9/92. (su) [Entry date 10/28/92]
10/27/92	12	MOTION by Rafael Hernandez-Colon, Hermenegildo Ortiz-Quinonez, Norma Perez-Giraud, Rosaura Gonzalez-Rucci, Reinaldo Hernandez-Berrios, Manuel Lopez-Rodriguez, Antonio Santiago-Vazquez to Accept Spanish Language Documents exhibits C, D & G and consider it as such the sole purposes of the mot req dismissal (su) [Entry date 10/28/92]
10/29/92	13	ANSWER to Complaint by Federal defendants (su) [Entry date 10/30/92]
10/29/92	14	MOTION by ELA defendants to Stay discovery proceedings until mot to dimiss is adjudicated. Response due 11/12/92 (su) [Entry date 10/30/92]
11/4/92	15	ORDER granting [10-1] motion to Intervene, granting [12-1] motion to Accept Spanish Language Documents exhibits C, D & G and consider it as such the sole purposes of the mot req dismissal. Provided that if further proceedings require

		that the documents be translated the defts will do so without delay. (signed by Judge Jaime Pieras Jr.) (su) [Entry date 11/05/92]
11/4/92	16	MOTION by all plaintiffs to Extend Time until 11/28/92 to oppo mot to stay (su) [Entry date 11/05/92]
11/5/92	–	Case ref to JP dkt #16 (su)
11/30/92	17	ORDER granting [16-1] motion to Extend Time until 11/28/92 to oppo mot to stay, Response to Motion reset to 12/4/92 for [14-1] motion to Stay discovery proceedings until mot to dismiss is adjudicated, reset to 12/4/92 for [11-1] motion to Dismiss, reset to 12/4/92 for [11-2] motion for Summary Judgment (signed by Judge Jaime Pieras Jr.) (il) [Entry date 12/01/92]
11/30/92	18	ORDER granting [14-1] motion to Stay discovery proceedings until mot to dimiss is adjudicated (signed by Judge Jaime Pieras Jr.) (il) [Entry date 12/01/92]
11/30/92	19	MOTION by all pltfs. to Compel discovery req. court order defts answer interrogatories and that reasonable attys fees be awarded to pltfs. (il) [Entry date 12/01/92]
12/1/92	–	CASE NO LONGER REFERRED TO JUDGE. (il)
12/1/92	–	CASE REFERRED TO JUDGE. (il)
12/1/92	20	RESPONSE by pall in opposition to [14-1] motion to Stay discovery proceedings until mot to dimiss is adjudicated

		by ELA defendants (ni) [Entry date 12/03/92]
12/3/92	21	MOTION SUBMITTING minutes to be included w oppo to mot to stay, by all plaintiffs (su) [Entry date 12/04/92]
12/11/92	22	MOTION by All plaintiffs for Reconsideration of [17-1] order Response to Motion reset to 12/4/92 for [14-1] motion to Stay discovery proceedings until mot to dimiss is adjudicated, reset to 12/4/92 for [11-1] motion to Dismiss, reset to 12/4/92 for [11-2] motion for Summary Judgment. Response due 12/24/92. (su) [Entry date 12/14/92]
12/16/92	23	RESPONSE by pall in opposition to [11-1] motion to Dismiss by defendant, [11-2] motion for Summary Judgment by defendant w/attchs. (il) [Entry date 12/18/92]
12/28/92	24	Informative Motion by pall re: submitting sworn statement omitted from opposition to motion for summary judgment, w/attach. (ni) [Entry date 12/29/92]
1/11/93	25	MOTION with Memorandum in Support by USA to Dismiss. with attachments. Response due 1/25/93. (ni) [Entry date 01/13/93]
1/11/93	26	MOTION SUBMITTING Slip Opinion from CCA from another case, w/attch. by pall (ni) [Entry date 01/13/93]
1/15/93	27	OPINION AND ORDER granting [11-1] motion to Dismiss, etc as stated herein.

		(signed by Judge Jaime Rieras Jr.) (ni) [Entry date 01/19/93]
1/15/93	28	JUDGMENT pursuant to O & O entered this date, the complaint is hereby dismissed. (signed by Judge Jamie Pieras Jr.) (ni) [Entry date 01/19/93]
1/15/93	–	Case closed (ni) [Entry date 01/19/93]
1/19/93	–	CASE sent to closed file on 1/19/93. (ni)
1/20/93	29	MOTION by pall to Extend Time until 2/16/93 to respond to defts mot to dismiss (il) [Entry date 01/21/93]
1/21/93	–	CASE REFERRED TO JUDGE. (il)
2/1/93	30	MOTION by Petra Cruz-Jimenez to Accept Spanish Language Documents (su) [Entry date 02/03/93]
2/1/93	31	MOTION, by all plaintiffs for Reconsideration of [28-1] judgment order, and/or to Amend [1-1] complaint. Response due 2/15/93. (su) [Entry date 02/03/93]
2/12/93	32	MOTION by pall for Reconsideration of [28-1] judgment order SUPPLEMENTAL referring to: [31-1] motion for Reconsideration of [28-1] judgment order w/attachs. (il) [Entry date 02/17/93]
2/17/93	33	MOTION by Regino Colon-Nievas to Extend Time for 20 days to translate into English Local Laws 58 & 66 (su) [Entry date 02/18/93]
2/19/93	34	MOTION by ELA defendants to Extend Time to 10 days to tender oppos to pltfs supplemental argument to defts mot for

		reconsideration (il) [Entry date 02/22/93]
2/26/93	35	RESPONSE by Federal defendants in opposition to [31-1] motion for Reconsideration of [28-1] judgment order, [31-2] motion to Amend [1-1] complaint (su) [Entry date 03/01/93]
3/3/93	36	MOTION SUBMITTING certified English translation of local Law 58 of 8/9/91 by pall w/attachs. (il) [Entry date 03/04/93] [Edit date 03/17/93]
3/3/93	37	ORDER mooting [30-1] motion to Accept Spanish Language Documents, mooting [29-1] motion to Extend Time until 2/16/93 to respond to defts mot to dismiss (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/04/93]
3/3/93	38	ORDER granting [33-1] motion to Extend Time for 20 days to translate into English Local Laws 58 & 66, mooting [32-1] supplemental motion for Reconsideration of [28-1] judgment order SUPPLEMENTAL (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/04/93]
3/3/93	39	ORDER denying [31-1] motion for Reconsideration of [28-1] judgment order, denying [31-2] motion to Amend [1-1] complaint (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/09/93)
3/8/93	40	ORDER [36-1] miscellaneous Noted. (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/09/93]
3/9/93	-	CASE REFERRED TO JUDGE. (il)

3/15/93	41	MOTION by All pla for Reconsideration of [39-1] order w/attachs in support thereof (il) [Entry date 03/17/93]
4/21/93	42	ORDER denying [41-1] motion for Reconsideration of [39-1] order, etc., as stated herein. (signed by Judge Jaime Pieras Jr.) (il) [Entry date 04/22/93]
4/22/93	–	ORDER [36-1] miscellaneous Noted. (signed by Judge Jaime Pieras Jr.) (il) [Entry date 03/09/93]
5/14/93	43	NOTICE OF APPEAL by All pla. FILING FEE $105. RECEIPT #67217 Transcript Order Form furnished to appellant. Appeal record due on 5/24/93 (il) [Entry date 05/17/93]
5/20/93	–	Certified and transmitted Record on Appeal to U.S. Court of Appeals: [43-1] appeal by All pla (il) [Entry date 05/21/93]
5/26/93	–	Notice of Appeal and certified copy of docket to USCA: [43-1] appeal by All pla (ni)
5/3/94	44	Printed OPINION from USCCA dated 4/28/94 re: [43-1] appeal by All pla: Affirmed (mi) [Entry date 05/04/94]
6/13/94	–	CASE sent to closed file. (mi)
6/22/94	45	JUDGMENT OF USCA ent'd on 4/28/94 (certified copy), issued as informal mandate, Re: [43-1] appeal by All pla; affirming (mi) [Entry date 06/27/94]
7/8/94	–	Record on Appeal returned from U.S. Court of Appeals: [43-1] appeal (mr)

8/8/94 – CASE sent to closed file. (mi)

8/8/94 – Request for disbursement sent to Finance (mi)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1331

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Plaintiff, Appellant,

v.

CONSTRUCTORA LLUCH, INC. AND CNA CASUALTY OF PUERTO RICO, INC.,
Defendants, Appellees.

Before

Torruella, *Chief Judge*,
Hall,* *Senior Circuit Judge*,
and Lipez, *Circuit Judge*.

ORDER OF COURT

Entered: April 13, 1999

Upon consideration of defendants-appellees' petition for rehearing, we deny the petition for the following reasons.

Appellees Constructora Lluch, Inc. and CNA Casualty P.R., Inc. raise two arguments in their petition for rehearing, neither of which merit revisitation. Appellees first argue that the remand of this case for a third jury trial on the issue of damages violates their rights under the Seventh Amendment that no fact tried by a jury

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* Of the Ninth Circuit, sitting by designation.

should be re-examined by a court. Appellee attempt to liken the Court's decision to the ordering of an additur and argue that this procedure was forbidden by the Supreme Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935). However, citing *Doop v. Pritzker*, 38 F.3d 1239 (1st Cir. 1994), appellees also recognize that a reviewing court may set aside the jury's assessment of damages if it falls outside the universe of theoretically possible awards that can be said to be supported by the evidence. As noted in the opinion, PRASA's unjustified demolition of the building resulted in the district court asking the jury to determine a theoretical damage award: the amount it would have cost to repair the structure prior to its demolition. The district court then instructed the jury that PRASA was entitled to recover that cost of repair. The evidence submitted by Lluch was that the cost of repair was $470,000, and the evidence submitted by PRASA was that the cost of repair was $8,744,017.48. Not even Lluch presented evidence that the cost of repair was zero, yet the jury still awarded no damages. In their petition, appellees attack the testimony offered by PRASA on this issue, but this attack does not change the fact that the range of awards supported by the evidence starts with Lluch's own expert, who admitted that the cost of repair was at least $470,000. Appellees also offer two theories as to how PRASA was never going to be responsible for the cost of repair, but those theories were rejected by both the district court and this Court because the jury was never instructed on those legal theories. Rather, the jury was specifically instructed that PRASA was entitled to recover the cost of repair. Given this instruction and given the testimony supporting a range of amounts representing

the cost of repair, we found that jury award of zero damages – well outside the supported range – was against the clear weight of the evidence. Appellees present nothing in their petition to change that determination.

Second, appellees argue that the Court erred in finding appellate jurisdiction to exist. Appellees submit the docket entries of *Acevedo-Villalobos* v. *Hernández*, 22 F.3d 384 (1st Cir.), *cert. denied*, 513 U.S. 1015 (1994), in an attempt to show that the Court erred in distinguishing that case. However, while that docket shows that the *Acevedo-Villalobos* district court disposed of the first post-judgment motion with an Opinion and Order that was not accompanied by a separate document, that is not at odds with the Court's opinion. The opinion stated that the *Acevedo-Villalobos* Court found that the tolling terminated with the denial of the first post-judgment motion, but that we could not find similarly in the present case. The *Acevedo-Villalobos* Court did not address the question of whether the denial of the first post-judgment motion was required to comply with the "separate document" rule; it merely treated that denial as an order capable of halting the tolling. In the present case, we addressed the question and followed *Fiore* v. *Washington Cty. Com. Mental Health Ctr.*, 960 F.2d 229, 233 (1st Cir. 1992) (*en banc*), and Fed. R. App. P. 4(a)(4) and (7), in finding that the "separate document" rule applies to all final orders denying and granting post-judgment motions, including the December 11, 1997 Opinion and Order denying PRASA's first post-judgment motion. Appellees do not argue in their petition that the December 11, 1997 Opinion and Order satisfies the "separate document" rule, only that

the Court should not require it to do so. Because *Fiore* and Rule 4(a)(4) and (7) require such orders to comply with the "separate document" rule, appellees' request that we follow *Acevedo-Villalobos* is a request that we ignore the "separate document" issue, which we cannot do.

Accordingly, appellees' petition for rehearing is denied.

By the Court
PHOEBE MORSE,

Clerk,

By: /s/ JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Lee, Junquera, Otero, Otero-Matos, Vidal,]
[Angelet-Frau]

Proceedings include all events.
3:90cv2334 PRASA v. Constructora Lluch,, et al
FILE APPEAL CLOSED
FILE APPEAL CLOSED

U.S. District Court
Puerto Rico (San Juan)

CIVIL DOCKET FOR CASE #: 90-CV-2334

PRASA v. Constructora Lluch,, et al
Assigned to: Judge Hector M. Laffitte
Demand: $750,000
Lead Docket: None
Dkt# in other court: None

Filed: 10/10/90
Nature of Suit: 190
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Injunctive & Declaratory Relief

10/10/90	1	COMPLAINT Filing Fee $ 120. Receipt # 54756 (il) [Entry date 06/24/92]
10/10/90	–	The entries hereafter are an extract of the original docket sheet. (il) [Entry date 06/24/92]
12/21/90	5	ANSWER to Complaint and COUNTER-CLAIM by Legal/General Assura (Attorney Luis M. Angelet) against Richmond Steel Inc. (il) [Entry date 06/24/92]
1/9/91	7	ANSWER by Richmond Steel Inc. to [5-2] counter claim by Legal/General Assura (il) [Entry date 06/24/92]
1/11/91	10	ANSWER to Complaint and COUNTER-CLAIM by PR Water/Sewer Auth. (Attorney Jorge Marrero) against Richmond Steel Inc. (il) [Entry date 06/24/92]

1/16/91	11	THIRD-PARTY COMPLAINT by Constructora Lluch against Seaboard Surety, Royal Insurance Co PR, National Union Fire Insurance, Eng. Valentin Beato (il) [Entry date 06/24/92]
1/16/91	11	ANSWER to Complaint and COUNTERCLAIM by Constructora Lluch (Attorney Jose Biaggi) against Richmond Steel Inc. (il) [Entry date 06/24/92]
1/16/91	11	CROSSCLAIM by Constructora Lluch against PR Water/Sewer Auth., Lebron Associates, Felipe Lebron P.E., Rene Purcell, Hector Zevala, Pedro A. Marrero, Eduardo Rodriguez (il) [Entry date 06/24/92]
1/16/91	12	THIRD-PARTY COMPLAINT by Lebron Associates against Valentin Beato Diaz (il) [Entry date 06/24/92]
1/17/91	12	ANSWER to complaint and CROSSCLAIM by Lebron Associates (Attorney Richard Lee) against PR Water/Sewer Auth., ABC Insurance Co., Constructora Lluch (il) [Entry date 06/24/92]

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[Entry date 11/26/97]

12/1/97	620	TRANSCRIPT filed for excerpts of first day JT – Jury Selection Proceedings held before Judge Laffitte on 7/8/97, by B. Dachman. (il) [Entry date 12/02/97]
12/1/97	621	TRANSCRIPT filed for excerpt of fifth day JT proceedings held before Judge Laffitte on 7/14/97, by B. Dachman (il) [Entry date 12/02/97]

12/1/97 622 TRANSCRIPT filed for sixth day JT proceedings held before Judge Laffitte on 7/15/97, by B. Dachman (il) [Entry date 12/02/97]

12/11/97 – ENDORSED ORDER granting [619-1] motion for Leave to File reply to opp. to to mot. for new trial (signed by Judge Hector M. Laffitte) (il) [Entry date 12/12/97]

12/11/97 623 REPLY by PR Water Authority to response to [611-1] motion for second partial New Trial on damages or for reinstatement of the prior verdict of 1993 by PR Water Authority (il) [Entry date 12/12/97]

12/11/97 624 OPINION AND ORDER denying [611-1] motion for second partial New Trial on damages or for reinstatement of the prior verdict of 1993, etc., as stated herein. (signed by Judge Hector M. Laffitte) (il) [Entry date 12/12/97]

12/15/97 625 ORDER, The Court orders Constructora Lluch to respond by 12/30/97 to Richmond Steel's mot for execution of jdmt Response to Motion reset to 12/30/97 for [612-1] motion for Execution of Judgment (signed by Judge Hector M. Laffitte) (il) [Entry date 12/16/97]

12/11/97 626 MOTION by PR Water Authority to Amend [624-1] opinion order Response due 1/4/98 (su) [Entry date 12/23/97]

12/30/97 627 MOTION by Constructora Lluch for Execution of Judgment (ni) [Entry date 01/08/98]

1/22/98	–	ENDORSED ORDER denying [626-1] motion to Amend [624-1] opinion order (signed by Judge Hector M. Laffitte) (il)
1/23/98	628	RESPONSE by PR Water Authority in opposition to [627-1] motion for Execution of Judgment by Constructora Lluch (il) [Entry date 01/26/98]
1/27/98	629	NOTICE OF APPEAL [0-0] order, [624-1] opinion order, [610-1] judgment order by PR Water Authority. FILING FEE $ 105. RECEIPT # 90965 Transcript Order Form furnished to appellant Appeal record due on 2/6/98 (il) [Entry date 01/28/98]

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